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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

THE KING *v.* MIDDLESEX JUSTICES.

Ex parte BOND.

C. A.
1933
Feb. 7.

Husband and Wife—Petition by Husband for Divorce—Appearance by Wife—Decree absolute—Application by Wife to Justices for Custody and Maintenance of Child refused—Order on subsequent Application—Res judicata—Jurisdiction of Divorce Court—Certiorari—Guardianship of Infants Act, 1886 (49 *&* 50 *Vict. c.* 27), *s.* 5*—Guardianship of Infants Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 7, *sub-s.* 3*—Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193, *sub-s.* 1*—Matrimonial Causes Rules,* 1924 (*St. R. & O.,* 1924, *No.* 126/*L.* 2), *r.* 34.

In April, 1930, a husband petitioned for the dissolution of his marriage. His wife entered an appearance, but did not defend the suit, and a decree nisi was pronounced on November 3, 1930. On May 4, 1931, the wife applied to a court of summary jurisdiction for an order under s. 5 of the Guardianship of Infants Act, 1886, as amended by s. 3, sub-s. 2, and s. 7, sub-s. 1, of the Guardianship of Infants Act, 1925, for the custody and maintenance of a child of the marriage. The justices then ruled that as the matter was still pending before the Divorce Court they could

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not hear the application. On May 18, 1931, the decree nisi was made absolute. On August 24, 1931, the wife renewed her application to the justices. It was pointed out to the justices on behalf of the husband that the wife having entered an appearance on the petition of her husband for divorce was entitled to be heard in the Divorce Court on questions as to the custody of the children of the marriage. The chairman then said: "We cannot deal with this," and they refused to make an order. On April 11, 1932, the wife renewed her application to the justices, and a differently constituted court made an order giving her the custody of the child and ordering the husband to pay five shillings weekly for its maintenance while under the age of sixteen.

On an application by the husband for a writ of certiorari to quash the order of the justices, the Divisional Court [1933] 1 K. B. 72, made the rule absolute, holding that the matter was res judicata by the decision of August 24, 1931, whether that were regarded as a refusal to make an order from which refusal there had been no appeal, or as a decision that the matter was one which "would more conveniently be dealt with by the High Court," in which case s. 7, sub-s. 3, of the Guardianship of Infants Act, 1925, had expressly provided that no appeal should lie from such refusal. Lord Hewart C.J. and Avory J. also expressed the opinion that the jurisdiction of the Divorce Court, when it had become seised of a matrimonial cause, was an exclusive and overriding jurisdiction, and ousted that of the justices under the Guardianship of Infants Acts:—

Held, by the Court of Appeal, affirming the decision of the Divisional Court (1), that the matter was res judicata, but the Court declined to decide the further question whether the justices had concurrent jurisdiction with the Divorce Court as to the custody of children.

Appeal from an order of the Divisional Court. (1)

A rule nisi for certiorari directed to the justices for the Uxbridge Petty Sessional Division of Middlesex had been obtained in order to remove into the High Court, that it might be quashed, an order made on April 11, 1932, whereby the legal custody of one Alick Geoffrey Arthur Bond, an infant, was committed to his mother, Hettie Maud Bond, and whereby his father, William Frederick Bond, was ordered to pay to the said Hettie Maud Bond the sum of five shillings weekly for the maintenance of the said infant while under the age of sixteen years. The grounds for the rule were that the justices had no jurisdiction to make the order (*a*) for the reason that their jurisdiction was exhausted and/or excluded by a previous order made in the same matter by the justices of the same Petty Sessional Division on August 24, 1931, and that the matter was res judicata by reason of that order; (*b*) for the reason that a decree for the dissolution of the marriage of the parties having been made absolute by the Divorce Division of the High Court on May 18, 1931, the jurisdiction of the justices to deal with matters affecting the custody or maintenance of the children of the said marriage was excluded.

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(1) [1933] 1 K. B. 72.

The parties were married on April 16, 1919. On December 14, 1920, a girl was born whose custody was not in dispute, and on July 3, 1923, the child Alick Geoffrey Arthur Bond was born. On April 25, 1930, the husband filed a petition for the dissolution of the marriage. The wife entered an appearance, but did not defend the suit, and on November 3, 1930, at Lincoln Assizes, MacKinnon J. pronounced a decree nisi on the husband's petition. On May 4, 1931, the wife made her first application to the justices under s. 5 of the Guardianship of Infants Act, 1886 (1),

(1) Guardianship of Infants Act, 1886, s. 5: "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent. . . ."

Guardianship of Infants Act, 1925, s. 3, sub-s. 1: "The power of the court under s. 5 of the Guardianship of Infants Act, 1886, to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is then residing with the father of the infant."

Sub-s. 2: "Where the court under the said section as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable."

Sub-s 4: "Any order so made may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order."

Sect. 7, sub-s. 1: "For the purposes of the Guardianship of Infants Act, 1886, as amended by this Act, the expression 'the court' shall include a court of summary jurisdiction. . . ."

Sub-s. 3: "Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by this Act, the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court:

"Provided that, where any such application is made to a court of summary jurisdiction, and the court considers that the matter is one which

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as amended by s. 3, sub-s. 2, and s. 7, sub-s. 1, of the Guardianship of Infants Act, 1925, asking for the custody and maintenance of the child, but the justices then ruled that as the matter was still pending before the Divorce Court (the decree not having been made absolute), they could not hear the application. On May 18, 1931, the decree was made absolute, and on August 24, 1931, Mrs. Bond renewed her application to the justices. The question was again raised as to the jurisdiction of the High Court, and it was pointed out that, Mrs. Bond having entered an appearance to the petition, it was still open to her to apply to the Divorce Court for an order with respect to the custody and maintenance of the child. The chairman then said: "We cannot deal with this," and they refused to make an order. On April 11, 1932, the wife made a third application to the justices, the Bench being differently constituted on this occasion, and the justices made the order which the husband sought to quash by this rule. They gave as the grounds of their decision "that the previous application had been dismissed under a misapprehension, in that the justices were not then aware that the divorce proceedings above mentioned had been undefended, or that the said proceedings took place in Lincoln, or that no request was addressed therein to the Court in respect of the said child, and that the previous decision was 'a mistake.'"

The Divisional Court (Lord Hewart C.J., Avory and du Parcq JJ.) made the rule absolute to quash the order of the

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would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order, and in such case no appeal shall lie to the High Court."

Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, sub-s. 1: "In any proceedings for divorce . . . ., the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

Matrimonial Causes Rules, 1924, r. 34: "After entering an appearance a respondent in a cause may without filing an answer be heard in respect of any question as to costs and a respondent who is husband or wife of the petitioner may be heard also as to custody of or access to children."

justices, holding that the matter was res judicata by the decision of August 24, 1931, whether that were regarded as a refusal to make an order from which refusal there had been no appeal, or as a decision that the matter was one which "would more conveniently be dealt with by the High Court," in which case s. 7, sub-s. 3, of the Guardianship of Infants Act, 1925, had expressly provided that no appeal should lie from such refusal. Lord Hewart C.J. and Avory J. were also of opinion that the jurisdiction of the Divorce Court, when it had become seised of a matrimonial cause, was an exclusive and overriding jurisdiction and ousted that of the justices under the Guardianship of Infants Acts.

Mrs. Bond appealed.

J. F. Compton Miller for the appellant. The decision of the Divisional Court in making absolute the rule nisi for a writ of certiorari to quash the order of the justices was wrong. Each application which is made to a court with regard to the custody and maintenance of an infant is an entirely separate application and stands by itself. The justices having made an order or refused to make an order may, on a subsequent application on fresh facts, vary, alter or discharge the previous order. Either parent may make a fresh application from time to time. The welfare of the child is what the court principally considers, and a fresh application may be justified by a change in circumstances within a very short time of the previous application. The matter was not res judicata when the justices made the order of April 11, 1932, as the merits of the case had not been gone into on the former occasions. The decision of August 24, 1931, was given on a preliminary objection and not on the merits. Cases with regard to infants formerly always went to the Chancery Division of the High Court, and therefore one has to look at the Chancery practice with regard to this matter. There is no case in which the plea of res judicata has been put forward as a bar to an application in the Chancery Division with regard to an infant. In a bastardy case a mother who was unsuccessful in an application for an affiliation order was allowed to make another application within the prescribed time, the dismissal of the first application for want of corroborative evidence being treated as a non-suit: see *Reg.* v. *Harrington.* (1) The same principle applies with regard to applications as to the custody and maintenance of infants. There is no case in which it has been held that a decision of a court on the ground of want of jurisdiction amounts to res judicata so as to prevent the subsequent adjudication of the case on its merits. In the present case the husband did not ask for the custody of this child in the divorce proceedings. All the cases cited in the Court below on the question of res judicata were analogous cases only, and did not deal with the case of a child.

The Legislature by s. 7, sub-s. 1, of the Guardianship of Infants Act, 1925, for the first time gave jurisdiction to courts of summary jurisdiction to make orders with regard to the custody and maintenance of infants. After the passing of that Act courts of summary jurisdiction had concurrent jurisdiction with regard to such matters with the High Court. The Legislature intended that there should be more than one court with jurisdiction to deal with such applications. The jurisdiction of the Divorce Court with regard to the custody and maintenance of infants is not an exclusive jurisdiction but is concurrent with that of courts of summary jurisdiction under the Guardianship of Infants Acts. There are no provisions in those Acts preventing applications being made to courts of summary jurisdiction with regard to the custody of infants in cases where proceedings for divorce have been taken between the parents of the infant. Applications with regard to the guardianship of infants in such cases must be dealt with in the same way as applications with regard to the guardianship of children in cases in which there is no question of divorce. Bateson J. in *Vigon* v. *Vigon and Kuttner* (2) did not lay down the proposition that the jurisdiction of the High Court with regard to the custody of children was an exclusive jurisdiction. His judgment assumed that courts of summary jurisdiction also had jurisdiction to deal with

(1) (1864) 28 J. P. 485.

(2) [1929] P. 157.

applications with regard to that matter, but that the jurisdiction of the High Court was paramount. When the case went to the Court of Appeal (1) that Court declined to deal with the question of jurisdiction.

M. D. Van Oss and *R. N. Kirkby* for the respondent were not called on.

SCRUTTON L.J. We need not trouble you, Mr. Van Oss. This case raises, but I am afraid will not decide, a question which has evidently given rise to considerable hesitation on the part of some of the superior authorities. The point is this: The Divorce Division of the High Court has jurisdiction over matrimonial relations, and by s. 193, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided: "In any proceedings for divorce . . . . the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings." Then by one of the Matrimonial Causes Rules it is provided: "After entering an appearance a respondent in a cause may without filing an answer be heard . . . . as to custody of or access to children."

Mr. Bond brought a petition for divorce against his wife, Mrs. Bond, and she entered an appearance. She, therefore, under the rule I have just read, though she did not defend the case, but merely entered an appearance, would be entitled to be heard by the Divorce Division of the High Court as to the custody of the children. The Court found her guilty of adultery and made a decree nisi. Mrs. Bond, before the decree was made absolute, made an application with regard to the custody and maintenance of a child of the marriage to a court of summary jurisdiction, which has jurisdiction under the Guardianship of Infants Act, 1925, to make, in a number of cases where there is no question as to divorce, such as the death of the father or the mother, or the death of a guardian appointed, orders as to the custody of an infant

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(1) [1929] P. 245.

Scrutton L.J.

and the right of access thereto under the Guardianship of Infants Act, 1886, as amended by the Guardianship of Infants Act, 1925. The justices, on hearing that proceedings were pending in the Divorce Division of the High Court, declined to make an order. They may have purported to act under the provisions of the proviso to sub-s. 3 of s. 7 of the Act of 1925, which says: "Provided that, where any such application is made to a court of summary jurisdiction, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order, and in such case no appeal shall lie to the High Court." At any rate, they declined to make any order on the application of the mother. The father did not, when the decree nisi was made, ask for any order as to the custody of the child in question in this case, but he had asked for and obtained an order as to the custody of another child of the marriage. After the decree was made absolute on May 18, 1931, the mother renewed her application to the same court of summary jurisdiction on August 24, 1931, and the justices repeated their refusal to deal with the matter. Their judgment is said to have consisted of the remark "We cannot deal with this." Anyhow they made no order. The mother was not disheartened. She made a third application to the same court of summary jurisdiction, but this time the court was differently constituted. The justices decided that they would make an order for custody of the child in favour of the mother with 5*s*. a week payable by the father. According to the statement in the affidavit as to what the justices did, they gave as the grounds of their decision, "that the previous application had been dismissed under a misapprehension, in that the justices were not then aware that the divorce proceedings above mentioned had been undefended"—if that was the reason given, I cannot see what that had to do with the matter—"or that the said proceedings took place in Lincoln,"—that appears to have still less to do with the matter, because the father at the time of the petition was stationed at Cranwell in the Royal Air Force, and Lincoln was the most convenient place at which to bring the petition—" or that no request was addressed therein to the Court in respect of the said child,"—that appears to be true, but it does not take away the jurisdiction of the Divorce Division of the High Court, because an application with respect to the custody, maintenance and education of a child may be made after the decree nisi has been made absolute—" and that the previous decision was 'a mistake' " —speaking as a general rule one sitting of a Bench of justices has no authority to overrule a decision of a previous Bench on the ground that it was a mistake.

On that order being made, an application for a writ of certiorari to quash it as having been made without jurisdiction was made to the Divisional Court, and the Divisional Court, as I understand their order, granted the writ of certiorari quashing the order of the justices on two grounds. Firstly they said that the matter was res judicata, as the point had been decided on two previous applications by the justices, and that as there was no evidence of any change of circumstances it was not open to the justices to decide in a way different from the order which they had previously made. It is quite clear that justices can upon fresh evidence alter, vary or discharge the order they had previously made. The child might be four or five years older, and the expenses of maintaining the child might be different, or there might be a change in circumstances as to the father's means. But it appears to me quite clear that the justices cannot alter their previous order when, as in this case, there is no evidence of any fresh circumstances. I am of the same opinion as the Divisional Court—namely, that the matter was res judicata, and that is sufficient to decide the case. It is an excellent rule not to go, for the purposes of your decision, beyond what is necessary.

I see that in *Vigon* v. *Vigon* (1) the Court of Appeal declined to decide the question of jurisdiction as between the High Court and the court of summary jurisdiction.

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(1) [1929] P. 157, 245.

The Divisional Court has also in this case taken the view that the jurisdiction of the Divorce Division of the High Court is paramount or overriding in the sense, as I understand it, that when it has before it the principal question of the relations of husband and wife under the marriage tie, including the custody of children, that Court is alone seised with the question as to the custody of children and it is not open, while divorce proceedings are pending, to parties to those proceedings who have appeared in the Divorce Court to go to a court of summary jurisdiction and ask for an order on a matter which is within the jurisdiction of the Divorce Court. I have great sympathy with that view, but I feel that the statutes are rather embarrassing, because the Guardianship of Infants Act, 1925, though it might have said that in cases where proceedings for divorce are pending in the Divorce Division of the High Court the sole jurisdiction as to the custody of children of the marriage shall be with that Division, has not said so, but has put in a proviso to sub-s. 3 of s. 7 that if on an application to a court of summary jurisdiction the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order, and in that case no appeal shall lie to the High Court. It is obviously exceedingly inconvenient if a court of summary jurisdiction has equal jurisdiction with the High Court with regard to the custody of children in a case where proceedings for divorce have been brought in the Divorce Division of the High Court, and I feel that there is a great deal to be said for the view taken by the Divisional Court, but I do not at present think it right that the Court of Appeal should decide that point one way or the other in this particular case, where there is a conclusive answer to the appeal against the writ of certiorari quashing the order—namely, that the decision to be quashed was one given when the matter which it decided had already been decided between the same parties on the same facts.

For these reasons I think the appeal fails and must be dismissed with such costs as are appropriate to a Poor Person's case.

Greer L.J. I agree. Sub-s. 1 of s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that "In any proceedings for divorce . . . ., the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court." It is observable that power is given to the Court to make those orders, but there is no direction that the Court shall make any orders, nor is there in the statute, as far as I know, anything which says in so many words that the power so granted to the Divorce Court shall exclude the power of any judge before whom a similar application may be made under the Guardianship of Infants Act, 1925, or of any Court, whether it be a court of summary jurisdiction or the High Court. But I agree that it is extremely inconvenient that applications should be made to any Court other than the Divorce Court, while the Divorce Court has power to make the order which ought to be made on full consideration of the disputes that have taken place between the husband and wife. But though I express some doubt whether the jurisdiction of the High Court is exclusive, I do not think it necessary to decide that point on the present appeal, because I am satisfied that the other reason given by the Divisional Court is right—namely, that in this case the parties have, both before and since the decree was made absolute, litigated before the justices the question whether the justices were entitled to make any order, notwithstanding the divorce proceedings, and the power given to the Divorce Court. As I understand the decision of the justices on both these occasions it was that they had in law no jurisdiction to deal with the matter at all. That decision may be right or wrong in law, but so long as it stands it is binding on the parties to the litigation, and there is in law an estoppel which prevents the wife from making a fresh application based on the same facts, so far as the matter for decision is concerned with the jurisdiction of the justices.

For these reasons I agree that the appeal should be dismissed.

SLESSER L.J. On May 4, 1931, the justices decided, upon the application of the mother for the custody and maintenance of the child, that as the matter of the husband's petition for divorce was still pending in the High Court of Justice, the decree nisi not having then been made absolute, they had no jurisdiction to make an order, at any rate until the decree nisi was made absolute. On May 18, 1931, the decree was made absolute, and on August 24, 1931, the justices dismissed a second application with the words " We cannot deal with this." I am of opinion that the justices decided conclusively, at any rate, on August 24, 1931, that the decree absolute having been made in the Divorce Division of the High Court they had no jurisdiction to make an order. Later on the same court of summary jurisdiction, differently constituted, purported to exercise jurisdiction notwithstanding the former decision and made an order for custody and maintenance of the child. It has been argued that, inasmuch as the statute permits more than one application with regard to this matter to be made to the justices, there was no estoppel per rem judicatam on the earlier occasions. I think that argument is ill-founded. The question which was raised on the third occasion, when the justices entertained jurisdiction, was identical both as regards the subject-matter and the matters to be decided in law as on the two earlier occasions. On all three occasions the only question of jurisdiction was whether what had happened in the Divorce Court was or was not of such a compelling nature that the justices had no jurisdiction, and therefore, as has been stated by my Lords, this case is concluded by the decision on the earlier occasion of the justices that they had no jurisdiction, which operated as an estoppel on the third occasion, and to that extent I think the decision of the Divisional Court was right.

I desire, however, to reserve my decision as to the further grounds which are stated by two of the learned judges, but not by du Parcq J., as to the respective jurisdiction of the

High Court and a court of summary jurisdiction. Without expressing any concluded opinion, I find at least one indication that the Divorce Court has, as has been stated in one of the cases, a paramount jurisdiction, and that is to be found in s. 7, sub-s. 3, of the Guardianship of Infants Act, 1925, where in a proviso it is expressly provided that "where any such application is made to a court of summary jurisdiction, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order." Therefore, one of the grounds upon which a court of summary jurisdiction can refuse to make an order is the consideration that "the matter is one which would more conveniently be dealt with by the High Court." Those words seem inapt to deal with a case which is already before the High Court. If, therefore, the justices must be considered as having concurrent jurisdiction with the High Court it would appear that the justices have power under the proviso to refuse to deal with the matter when it is one which would more conveniently be dealt with by the High Court, but may not refuse to deal with the matter when it is actually being dealt with by the High Court, which would seem to be a rather absurd conclusion. That consideration appears to afford some ground for the view that the Legislature contemplated that when the High Court had seisin of the matter it could not be debated before a court of summary jurisdiction. I, however, express no concluded opinion on that point. It is sufficient to say that in the present case on the question of jurisdiction the justices were estopped from making the order which they purported to make.

Appeal dismissed.

Solicitors for appellant: *Pierron & Morley.*
Solicitor for respondent: *W. A. L. Osborn.*

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Feb. 1, 2;
March 1.

BRITISH TRAWLERS FEDERATION, LIMITED, AND OTHERS *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

[1931. B. 3372.]

Shipping—Docks—Fish Market at Lowestoft—Right of Dockowners to impose Conditions as to Removal of Fish by Motor Vehicles—Harbours, Docks, and Piers Clauses Act, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 33.

The defendants owned and carried on the harbour and dock undertaking at Lowestoft under and subject to a series of statutes with which the Harbours, Docks, and Piers Clauses Act, 1847, was incorporated. On the dock premises was a place, called the fish market, where fish had been sold for over eighty years without interference by the dockowners. In 1930 the defendants issued a notice that road vehicles would not be admitted to the fish market unless by licence from the defendants and subject to the condition that the vehicles admitted should not be used for the transport of fish beyond the boundaries of the dock premises except in the case of fish consigned for transport by rail from Lowestoft or for sale and consumption within a radius of twelve miles of the dock premises, and, further, that no fish transported by such vehicles should be transferred directly or indirectly to or from any other road vehicle for conveyance to any place beyond a radius of twelve miles from the dock premises. The plaintiffs, who were either trawl owners at Lowestoft or merchants there dealing in trawl fish, claimed a declaration that they were entitled to remove their fish by the usual commercial methods, including motor vehicles, unrestricted as to the manner in which the fish should be dealt with after its removal from the dock premises:—

Held, (1.) that by virtue of s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, which provides that "upon payment of the rates made payable by this and the special Act . . . . the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods . . . ." the plaintiffs were entitled not only to "unship" the trawl fish in the sense of transferring it from the trawlers to the quays, but were entitled to remove it from the dock premises; (2.) that the plaintiffs were entitled to sell the fish on the quay under proper regulations and to remove it by usual commercial methods, including motor vehicles; and (3.) that the defendants were not entitled to impose conditions on the use of those vehicles as to the place to which the fish should be taken or at which it should be consumed.

Barker v. *Midland Ry. Co.* (1856) 18 C. B. 46 and *Perth General Station Committee* v. *Ross* [1897] A. C. 479 distinguished.

Decision of Branson J. reversed.

APPEAL from a decision of Branson J.

The facts, which are fully stated in the judgments, were shortly as follows :—

The plaintiffs, who were all engaged in the trawl fishing industry at Lowestoft, some of them as trawl owners and others as merchants, claimed (inter alia) a declaration that they had a right, as owners of trawl fish landed at Lowestoft harbour or at the defendants' fish market in the harbour, or purchased in that harbour or market, to remove the fish by the usual commercial methods, including removal by means of motor and other vehicles.

The defendants were the owners of Lowestoft harbour and docks undertaking, which comprised (inter alia) the fish markets in the docks and certain approaches thereto, and they carried on the harbour and dock undertaking under and subject to a series of statutes with which the Harbours, Docks, and Piers Clauses Act, 1847, was incorporated. The plaintiffs alleged that by those statutes the harbour and docks were open to all persons for commercial purposes, dues being charged by the defendants in respect of such user; that the defendants had made by-laws providing (inter alia) that the master of every vessel bringing fish for sale within Lowestoft harbour should moor or place his vessel at or near the proper fish markets and should discharge his vessel forthwith and the fish sold at those markets only as therein mentioned, and that every person landing fish should remove the same within twelve hours after landing; that since July, 1930, the defendants claimed the right to exclude from their said dock and harbour premises and from access to the fish market there vehicles used or sent by owners of vessels landing and/or selling fish there, and the vehicles of buyers of fish landed and sold there, unless those owners and buyers first obtained and accepted licences from the defendants on restrictive conditions imposed by them, those conditions including the following: that the vehicle should at all times whilst upon the defendants' premises exhibit a distinguishing badge issued by the defendants; that the vehicle should not be used for the transport of fish beyond the boundaries of the defendants' fish dock estate at Lowestoft except in the case of fish consigned for transit by railway from Lowestoft or for sale and consumption within a radius of twelve miles of the fish docks or elsewhere outside such radius as previously approved by the defendants; that no fish transported by the said vehicle should be transferred directly or indirectly to or from any other road vehicle for conveyance to any place beyond a radius of twelve miles from the fish docks; that the person or persons in charge of the vehicle should at all times whilst upon the defendants' premises obey and abide by all the rules and regulations of the defendants and the instructions of their duly authorized officials; that the defendants might at any time they deemed it necessary to do so withdraw the said licence by notice in writing without assigning the reason for their so doing; and that the licence unless otherwise withdrawn should remain in force for twelve months.

The plaintiffs alleged that these conditions were imposed by the defendants for the purpose of restraining competition with themselves as a railway, and to prevent owners and buyers, including the plaintiffs, from carrying or sending their fish from the fish markets by road, and to compel them to send it by the defendants' railway and pay carriage charges thereon. The enforcement of these conditions, the plaintiffs alleged, was injurious to them and was against the public interest, and accordingly the plaintiffs claimed a declaration in the terms set out above, and an injunction restraining the defendants from interfering with the passage of motor and other vehicles of or sent by the plaintiffs to and from the defendants' dock premises for the purpose of removing the plaintiffs' trawl fish landed or purchased at the said docks, harbour or market.

The defendants claimed that as owners and occupiers of Lowestoft harbour and docks, and by virtue of their statutes, they were entitled to prescribe in such manner as they deemed necessary or desirable the type of vehicle which might enter their dock premises, and to exclude such vehicles as they deemed it necessary or desirable to exclude; to impose such conditions on the user of vehicles entering their said premises as they thought fit; and to impose upon the user of any vehicle entering their said premises the conditions which they had in fact imposed. They also relied upon their by-laws of 1927, among others upon the following:—

"59. No person shall come, be, or remain upon the piers, lock-walls, quays, or any part thereof, or on any part of the company's premises, unless engaged in and for the purpose of business with or on behalf of the company, except by permission of the Harbour Master, and any such person shall whenever so required by the Harbour Master or other authorised servant of the company inform him of the business or matter in respect of which such person claims to be entitled to be upon the company's premises."

"60. No person shall ride, drive any horse or other animal, or otherwise propel any vehicle of any description in the markets or on the piers, lock-walls, or quays, or any part thereof, or on any part of the company's premises, without the permission of the Harbour Master."

The defendants claimed a declaration that they were entitled to impose the conditions in fact imposed by them as to the user of the dock premises.

Branson J. held that the defendants were under no statutory duty to allow sales of fish to take place upon their dock premises at Lowestoft, and therefore that they could lawfully attach to the permission to allow sales taking place there such conditions as they thought fit, including conditions as to the means whereby the fish sold should be removed.

The plaintiffs appealed. The appeal was heard on January 23, 24, 25, 26, 27, 30, 31; February 1, 2.

Schiller K.C. and *Sir Robert Aske* for the appellants. By a series of local Acts—8 & 9 Vict. c. xlv., 9 & 10 Vict. c. cxxxii., 10 & 11 Vict. c. xcviii., 25 & 26 Vict. c. ccxxiii., 28 & 29 Vict. c. clxxxiv., and 60 Vict. c. xxxiii.—Lowestoft harbour became vested in the respondents' predecessors in title and is now vested in the respondents. Certain of these Acts recognize the existence of a fish market in the harbour, and such recognition implies that all the incidents

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of a market are attached to it. Unless there was a market in the true sense in existence it is difficult to see why the railway company wanted the additional powers they obtained under several of their Acts. There being a market there, the Legislature obviously intended that there should be sales, and this again implies a right in the public to come and buy fish. Further, it is to be noted that several of the respondents' Acts incorporate (inter alia) the Harbours, Docks, and Piers Clauses Act, 1847, which by s. 33 provides that "upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers." That entitles the trawlers to land their fish in the market and to have it removed by ordinary commercial methods, which now include motor vehicles. No doubt the respondents have certain powers to regulate the market, but, as was pointed out in *Toronto City Corporation* v. *Virgo* (1) and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2), a statutory power to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner. In effect the respondents are seeking to prevent the use of this market by imposing the conditions of which the appellants complain. Where rates and charges are exacted under statutory powers, the person exacting them must provide the accommodation mentioned in the statute: see *Aiton* v. *Stephen* (3); see also *Bolt* v. *Stennett.* (4) The cases of *Barker* v. *Midland Ry. Co.* (5) and *Perth General Station Committee* v. *Ross* (6), which Branson J. regarded as authorities showing that the respondents had a right to exclude the appellants from the docks, do not support that proposition. In each of those cases there was no right on the part of those claiming access

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(1) [1896] A. C. 88.
(2) [1896] A. C. 348.
(3) (1876) 1 App. Cas. 456.
(4) (1800) 8 T. R. 606.
(5) 18 C. B. 46.
(6) [1897] A. C. 479.

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to the railway company's premises such as the appellants are entitled to in this case by virtue of the public market in the dock premises.

[They also referred to *Kingston-upon-Hull Dock Co.* v. *La Marche* (1) and *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee.* (2)]

Miller K.C., *James Wylie* and *Colin H. Pearson* for the respondents. While it may be the fact that in 1865 a practice existed of selling fish in the place where the Lowestoft docks now are, there is no evidence that this was an ancient market. The word "market" is used in the statutes and documents merely to describe the permitted concourse of people selling and buying at the particular place. No duty was imposed upon the railway company to make the docks: see *York and North Midland Ry. Co.* v. *Reg.* (3) and *Reg.* v. *Great Western Ry. Co.* (4) Further, the power given to the company to regulate the docks in no way affected its common law rights over the space where the sales of fish took place. If it is said that the company's statutes imposed upon the company a duty in reference to the market, that duty must be sought in the statutes, and none such can be found. There is no delimitation of what is called the market by metes and bounds, nor is there any statement when it shall be held. Reliance is placed by the appellants upon s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, in support of their claim, but that section merely confers a personal right of access to the docks for the purpose of unshipping goods. That right may be conceded, but the appellants make a much greater claim—namely, to bring upon the dock premises motor vehicles without restriction. Such a claim cannot be said to be ancillary to the right to unship goods. To entitle them to what they claim, the appellants must establish that the bringing on to the dock premises of motor vehicles is essentially necessary, and they fail to do this. They have full opportunities of removing their fish: they can, for example, remove the fish by hand-carts.

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(1) (1828) 8 B. & C. 42.

(2) [1892] 3 Ch. 242.

(3) (1853) 1 E. & B. 858.

(4) (1893) 62 L. J. (Q. B.) 572.

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"Unshipping" ends before the question of removal by buyers begins.

[Lawrence L.J. A right of removal is surely implied.]

Yes, but that right is limited to the means essentially necessary to the enjoyment of the right conferred. In *In re Dudley Corporation* (1) Brett L.J. said (2) that the general rule was that where power is given by statute to do anything of a public character, all the rights are given "without which the power would become wholly unavailable" and would be "illusive, ridiculous, and wholly inoperative." In this case it cannot be said that the right conferred upon the public to enter the dock premises is "wholly unavailable," or "illusive, ridiculous, and wholly inoperative," unless the appellants get the wider powers claimed: see also *Titchmarsh* v. *Royston Water Co.* (3) as to ways of necessity; and *Metropolitan Board of Works* v. *Metropolitan Ry. Co.* (4) as to right of support for a sewer. In *Gas Light & Coke Co.* v. *St. Mary Abbott's Kensington Vestry* (5) the defendants were restrained from using steam-rollers in such a way as to injure the pipes of the plaintiffs, and just as there the defendants could repair their roads otherwise than with steam-rollers of the weight used, so here the plaintiffs can enjoy their right of access to the docks without bringing in motor vehicles. In *Port of London Authority* v. *Cairn Line of Steamships* (6) it was held that an exclusive right of weighing and measuring goods loaded or discharged in the docks did not involve an exclusive right of providing weighing-machines; in other words the provision of weighing-machines was not essential to the enjoyment of the express right given. That again supports the view for which we contend. See also the same principle applied in *Great Central Ry. Co.* v. *North Eastern Steam Fishing Co.* (7), and the observations of Patteson J. in *King* v. *Burrell.* (8) We also rely on our by-laws, particularly by-law 60.

(1) (1881) 8 Q. B. D. 86.
(2) Ibid. 93.
(3) (1899) 81 L. T. 673.
(4) (1869) L. R. 4 C. P. 192.
(5) (1885) 15 Q. B. D. 1.
(6) [1913] 1 K. B. 497.
(7) (1906) 22 Times L. R. 520.
(8) (1840) 12 A. & E. 460, 468.

Schiller K.C. in reply. The defendants are not entitled to say that as owners of the docks they can admit, or refuse to admit, as they choose, those coming to the docks and fish market on lawful business. The right of shipping and unshipping goods given by s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, clearly gives by implication the power to bring or take away goods in a reasonable and convenient conveyance. By-laws 59 and 60 are bad as offending against the rights conferred by that section. Decisions as to ways of necessity have no relevancy to the present question.

Cur. adv. vult.

March 1. The following judgments were read :—

SCRUTTON L.J. This is a troublesome case, and I am afraid it has not been brought to trial or conducted in a very satisfactory manner.

Lowestoft is, for customs purposes, a port, and it has in it a "harbour and dock." This undertaking was established by statute in 1827 with no connection with any railway. It is now, after a series of statutes and amalgamations, owned by the London and North Eastern Railway Company. The principal industry of Lowestoft, apart from visitors, is fishing and selling fish. In 1932, 14,204 fishing-boats, trawlers and drifters entered the port and 386 other vessels, many of which were concerned either with export of herrings or the supply of coal for the fishing-boats. In 1931, out of 49,977 tons of exports, 45,336 were tons of fish. Out of 201,652 tons of imports, 63,616 were tons of fish and 85,208 tons of coal, largely used by the fishing industry; 34,000 tons were "oil and spirit, mineral and motor," and "timber." Regular and recognized sales of fish were taking place on the quays of the harbour as the fish were landed from the boats, and the fish were removed from the quays of the harbour to land outside the harbour in their owners' vehicles, some for transit by rail from Lowestoft station, some for transit to their owners' premises, to be cured and exported, some for sale inland. Up to the time of the railway strike motors were not much used and were not objected to. But the railway strike forced on the attention of the traders in fish that it was possible, even advantageous, to get along without railways by the use of motor traffic on the roads. An increasing amount of traffic which used to go by railway began to be carried by motor. The railway companies did not like this development. In the first place (I think it is really the first place), it diminished their revenues. Sir Ralph Wedgwood, the General Manager of the London and North Eastern Railway, who had only become interested in Lowestoft about 1922, when his railway absorbed the Great Eastern Railway Company, said: "The other object (of the change objected to) is the legitimate claim of the railway company for consideration in the matter: we are running the dock at a loss. (412) (Q.) To get the traffic? (A.) Yes." Another object was said to be to prevent congestion in the docks by increasing motor vehicles. Sir Ralph Wedgwood stated that the company could not exclude vehicles altogether and carry everything by rail, because vehicles "were an essential part of the fish traffic," and the company had not enough trucks. (Q. 380.) He did not say, nor did any one say, and the judge does not find, that up to the present time long-distance motors had caused serious congestion in the docks, but it was said, and the judge agreed, that if motor traffic continued to increase there might be serious congestion. At present the figures both at Hull, the port considered in another case to be referred to, and Lowestoft failed to show any substantial congestion due to long-distance motor traffic, that is, goods carried by motor which used to go by rail. At Lowestoft, out of 666 vehicles using the docks, of which 396 were motors, about 10 were long-distance motors. At Hull, out of 1084 vehicles using the docks, about 20 were long-distance motors. Whatever might be feared in the future, there was no substantial congestion in the present. The predominant motive was the loss of revenue.

The railway company considered the matter and determined to try and protect their interests in Lowestoft and other East Coast fishing ports. At Lowestoft in June, 1930, they issued a notice that road vehicles would not be admitted to the private roads of the company unless they obtained a licence to which certain restrictive conditions were attached. The material restrictive condition was: "The said vehicle"—that is, the vehicle on the private roads—"shall not be used for the transport of fish beyond the boundaries of the railway company's Fish Docks Estate at Lowestoft except in the case of fish consigned for transit by railway from Lowestoft or for sale and consumption within a radius of twelve miles of the fish docks or elsewhere outside such radius as previously approved by the said company." It will be seen that the restriction was not as to what was to be done on the dock company's property, but as to what was to be done more than twelve miles away from the dock. The fish taken away from the dock must be not only sold but also consumed within the twelve mile radius. This action naturally caused considerable opposition in the fish trade at Lowestoft. On July 28, 1931, a writ was issued by certain persons interested in a particular section of the fish trade—that is, trawling—against the railway company. The writ asked in substance for a declaration that the plaintiffs were entitled to remove their fish landed or purchased at the fish market at Lowestoft by the usual commercial means, including motors or other vehicles, and that the company were not entitled to impose any condition on the use of such vehicles as to the place to which the fish were to be taken or at which they were to be consumed.

Unfortunately it was not appreciated in the Court below that all the plaintiffs represented one section only of the Lowestoft fishing industry. The British Trawlers Federation, Ld., as its name imports, is composed of owners of trawlers; the Consolidated Fisheries, Ld., is the principal trawler owner in Lowestoft; Valori, Craske and Mortimer are merchants buying trawl fish at the fish market and carrying them by long-distance motor to Ipswich, Norwich or Dereham, and villages on the route. None of them represented the herring trade, which has a separate federation, season and practices of its own.

There are two fishing seasons at Lowestoft, the herring season, for the last four months of the year, carried on by steam drifters, using surface nets, having an association of their own to protect their owners' interests, and disposing of the herrings in a different way from that in which trawl fish, caught by nets dredged along the bottom, are dealt with all the year round. No one represented the herring interests in the Lowestoft action, and the facts of the two fisheries were never investigated or understood in the Court below, but were assumed to be "the same as at Hull." In fact, they were markedly different; for instance, trawl fish were sold on the dock quay; herrings before they reached the quay. This might make a material difference on the question which emerged in the case, the right of the dock authority to prevent sales of fish on the quay, and their consequent removal, unless on terms which the dock authority imposed. Further, large quantities of herrings were taken out of the import dock in vehicles over public roads to private premises, cured or salted, and then taken again over public roads in vehicles to the export dock. Was a licence for these vehicles to be refused, unless the owners promised that the vehicles should never be used for long-distance traffic? These considerations decided this Court at an early stage in the hearing of this appeal to intimate that they would not make any declaration dealing with the herring trade in the absence of any one representing that trade, but would confine their declaration to trawl fish.

The writ as to Lowestoft being issued in July, 1931, the railway company, whose policy was not confined to Lowestoft fish, issued on September 23, 1931, a writ dealing with Hull, where long-distance traffic by motor had begun between Hull and such places as Leeds and York. The railway company issued their writ against a firm of fish buyers at Hull, and asked for a declaration that the company could prescribe the conditions on which alone vehicles could enter the dock, and, in particular, could prescribe terms similar to the Lowestoft licence. The defendants counterclaimed declarations similar to those asked for in the Lowestoft case.

Unfortunately for the efficient trial of the Lowestoft case, the Hull case was set down first for trial, and evidence was given as to the practices of Hull. When the Hull case was finished and the Lowestoft case came on, counsel, in the absence of adequate instructions, assumed that the practice of Lowestoft was the same as that of Hull. The relevant statutes were certainly different. The Hull statutes did not incorporate the Harbours, Docks, and Piers Clauses Act, 1847; the Hull statutes had a section (Act of 1883, s. 3) which did not appear in any Lowestoft Act. The argument of the railway company, that they had a right to prohibit certain acts on their premises except on their own terms, forced upon the attention of the judge whether the company could prevent sales of fish upon the quays except on their own terms. This resulted in a declaration granted by the judge that the railway company were entitled to prevent the Lowestoft plaintiffs from buying or selling fish on the quay except on terms imposed by the railway company. Neither party had asked in their pleadings for a declaration on this subject, and as fish had been sold on Lowestoft quays for over eighty years without any interference by the owners of the docks, such a declaration was a complete novelty in the fishing trade. The difficulties did not stop there. The railway company were asking a general declaration of rights against Messrs. Chester, purchasers of fish, at Hull, and not until the end of the case did any one appreciate that Messrs. Chester had agreements with the company which, until determined, entitled them to do what the railway company were contending they could not do. The Lowestoft case was worse, for the judge gave a general judgment on rights before it was brought to his attention by the company's counsel that at Lowestoft also the company had agreements with four of the plaintiffs which might allow them to do what the company were trying to stop them doing.

The Hull defendants did not appeal.

The Lowestoft appeal had not proceeded very far in the Court of Appeal when questions from the bench elicited the admission of counsel that the Lowestoft practice was not the same as at Hull, as it had been assumed to be, but was materially different.

What was the Court of Appeal to do ? One course would have been to send the case back for a trial at which the real facts could be ascertained. Counsel deprecated this course, and, bringing up experts on each side from Lowestoft, succeeded in agreeing the real facts as to Lowestoft and producing a series of dock company regulations, by-laws and rates and plans which enabled the Court to ascertain the history of the sale of fish on the harbour quays. There was no need to amend the pleadings ; the Lowestoft plaintiffs stood by the declarations they asked, and objected entirely both to the declarations the railway company originally asked and the declaration the judge gave them, especially as to the right of the dock company to prohibit buying and selling fish on the dock quays. The railway company, while standing by the judge's declaration, were content with the original declaration asked for, but submitted on full consideration a new form of declaration for which they asked. The Court of Appeal, therefore, proceeded with the case, though on very different and, I think, more suitable materials than those which the judge had before him below.

It becomes necessary to go into the history of the dock and its statutes and of the fishing trade at Lowestoft, though in my opinion the really fundamental question is the effect of the Act of 1865, both by its own special conditions and by its incorporation of the Harbours, Docks, and Piers Clauses Act, 1847, especially ss. 33, 83 and 89 of that Act.

There was no harbour or dock at Lowestoft before 1827 and no customs port at Lowestoft before 1852. Apparently, from a Lowestoft history produced to us, in the eighteenth century the fishing-boats owned by the people who cured fish landed their fish, which was taken to the owner's private curing establishments, cured and sorted, and sent by sea for sale abroad or to London.

The river Waveney sends water into the sea both at Lowestoft and through Breyden Water and the Yare at Yarmouth. It was possible by a circuitous water route through two Broads, Lake Lothing and Oulton Broad and Oulton Dyke, to get to Norwich through the Waveney, Breyden Water and the Yare. An Act of 1827, having no connection with any railway, authorized the construction of a harbour at Lowestoft and the improvement of the waterway, especially by a " new cut " to Reedham, well known to people who now sail on the Broads, which avoided the roundabout transit through Breyden Water. It is very doubtful how much was done under this Act, as the undertaking soon came to financial grief. The Act gave power to make an entrance cut from Lake Lothing into the sea, and at that point to make and maintain a port or harbour and wharf for loading and unloading. The undertaking might make rules, by-laws or orders for the superintendence and management of the undertaking, and of the boatmen who carried goods on the undertaking or used the harbour works. Penalties for breaches of the rules were imposed or adjudged to be due by the half-yearly meetings of shareholders subject to appeal to quarter sessions. The proprietors could levy duties on goods using the harbour, according to schedule. There is no express mention of fish in the schedule of dues, but an omnibus heading of " other goods not specified " would apparently allow some landing dues on fish, which were probably claimed and paid. Dues could be levied on fishing-boats per ton " for the import landing and delivery of white undried and unsmoked fish or for any other purpose connected with the managing conducting and carrying on of the fisheries," but a fishing-boat could get a kind of season ticket for the fishing season by paying 20*s*. a year.

The first connection with a railway appears in 1845, when an Act was obtained to authorize a short railway from Lowestoft to Reedham to join the Norwich-Yarmouth line and to enable the undertakers to improve the harbour of Lowestoft as they might think fit, taking a lease of Lowestoft harbour from the then proprietors. These powers were, in 1846, taken over by the Norfolk Railway Company, who were to become the absolute proprietors of the "railway harbour and navigation."

Certain works were then executed in Lowestoft harbour, and business in the fishing trade carried on thereon. The first certain information comes from a series of rules, regulations and books of rates produced to us. The first is a book of regulations belonging to a named collector of dues, which dates it as of the year 1850. Regulation 6 reads: "A convenient fish wharf and market being provided on the north side of the harbour convenient also for the railway station, no fish will be allowed to land elsewhere." The next book, dated 1852, contains a map showing the "fish house" on the north side of the then existing harbour, on land which has now been excavated to make the present Trawl Basin. The eighth regulation reads: "All fish are to be landed at the fish market on the north side of the harbour; no fish will be allowed to be landed elsewhere without special permission." There is no evidence when this "fish house" or "fish market" was built. The dues on fishing-boats are stated in the Regulations of 1857, as authorized in the Act of 1827; there are no specific dues on fish, except as "other goods not specified." We get more detailed information from the Regulations of 1859, which for the first time include a separate set of "Fish Market Rules and Regulations." Regulation (1) is: "No fish shall be landed at any place within the harbour excepting at the fish markets." Regulation (2) is: "A true statement of the quantity and description of all fish delivered shall be given by the master of each fishing craft or his agent to the clerk of the market, at his office, and the landing dues thereon shall be paid forthwith unless the salesman agree in writing, signed by him, to be responsible for payment of them." There is now mentioned a "clerk of the market" and "fish salesman," mentioned again in Regulation (9), as selling for particular boats. Regulation (4) is: "Fish must be removed from the markets on the day of landing if practicable, and if not, before 8 o'clock on the following morning." Regulation (8) is : "All orders for the regulation of the markets and the business thereof, given by the harbour master or his deputies, the clerk of the market, constable, or other officials, must be strictly and promptly obeyed." Regulation (9) is : "Fish salesmen must produce their books whenever required to do so, at reasonable hours, by the harbour master or the clerk of the market, for the purpose of showing the true quantities of the fish delivered by the boats for which they respectively sell." There are still no specified "landing dues" on fish, unless they come under "all other goods not specified in this schedule."

We now reach the most important Act in the case. In 1862 the Great Eastern Railway was formed by the amalgamation of a number of small railway companies in the Eastern Counties, including the Norfolk Railway Company, which then owned Lowestoft harbour. The Harbours, Docks, and Piers Clauses Act, 1847, was incorporated. Apparently this amalgamation led to a general overhaul of the affairs of the small companies brought under one management. An Act of 1865 recited : "Whereas it is expedient that the company should have further powers with reference to Lowestoft harbour and the company's station and property in connection therewith and for the better regulation thereof and of vessels and the fish market thereat, and that the company should be empowered to take certain tolls, dues and charges." The Harbours, Docks, and Piers Clauses Act, 1847, was again incorporated. This brought into application on Lowestoft harbour s. 33 of the Act of 1847 : "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

A great deal of discussion took place as to the true meaning of this section. Counsel for the railway company argued, without, I think, much conviction, that "unshipping" had a very limited meaning ; it only covered the operation of transferring goods from the ship to the quay, and the dock company had full control over the subsequent operation of taking the goods from the quay out of the dock premises. This argument, besides being quite unbusinesslike, gave no effect, in my opinion, to the words "shall be open to the public." The passenger has a right to "embark" by entering the dock premises, proceeding to the ship and embarking thereon; he has a right to "land" by leaving the ship and proceeding over the dock premises to their limits. The "shipper" of goods has a right to bring them on to the dock premises, and through those premises to the ship on which they are shipped. He has a right to "unship" them by taking them from the ship and out of the dock premises.

The next step in the company's argument was that, even if this was so, the way from the quay to the dock limits was in the nature of a "way of necessity." Ways of necessity implied in a grant by an unfettered owner of land were limited to the minimum necessary for the enjoyment of the grant, and did not give the most convenient way for the enjoyment of the grant. This is, in my opinion, a quite unfounded argument. The dock company is not an unfettered owner of land making a grant; it is getting compulsory powers to take land and to levy dues, in exchange for which the dock is to be open to the public. No doubt the public right has limits, just as the right of any individual member of the public on a highway has limits. A foot passenger has a right to cross the road, the driver of a car has the right to drive along the road. They cannot both exercise their right at the same time and in the same place. Each must have reasonable regard to the rights of others. So in docks, each shipper cannot insist on shipping at the same place and time as all the other shippers. The dock company can reasonably regulate the order and place of shipping so long as they do not destroy or unreasonably limit the shipper's right to ship. The dock company argued that they might exclude vehicles as a means of unshipping and limit the method of exit from the dock to carriage by hand or by hand-barrows. This did not fit in very well with a table of dues, which included "Engines, per ton," or with an annual landing of 65,000 tons of fish. I am clearly of opinion that the unshipper has a right to the use of reasonable vehicles, motor or horse-drawn, subject to reasonable regulation by the dock company as to pace, place and time, having regard to the reasonable rights of other members of the public and of the dock company. I am also of opinion that the dock company has no right to impose limitations on what the vehicles properly used in shipping or unshipping shall do outside the dock premises.

The dock company next argued that even if this were true of unshipping by the owners of fish landed, it had no application to sales on the quay, or to the admission of people who came to buy fish at the sales on the quay, and who, having bought them, brought vehicles into the dock to remove them.

At this point the second important point in the Act of 1865 comes into play. As I have stated, there was before the Act a fish market in operation on the quays, boats coming in with fish for sale, a building called the fish market, a clerk of the market, and fish salesmen selling for each boat. But the dock company had no power to make by-laws for regulating the sale. Sect. 83 of the Harbours, Docks, and Piers Clauses Act, 1847, did not mention sales. Action by regulation under the Act of 1827 was very cumbrous, and there were no very effective dues for the landing of fish. So the preamble to the Act of 1865 recited that it was expedient that the company should have further powers for the better regulation of the fish market and should be entitled to take certain tolls and duties. Accordingly, s. 16 of the Act gave the company, "in lieu of all tolls which the company now take in respect of the fish market at Lowestoft," certain increased dues for fish landed at the fish market, including a charge per package for trawl fish. Further, by s. 14, the company were given additional powers under s. 83 of the Act of 1847 to make by-laws for regulating the movements of boats bringing fish for sale within the harbour, and for "regulating the fish markets . . . . and the sale of fish on that part of the company's station known as the fish market, or on any other part of the company's property." The effect of by-laws made under the Act of 1847 is stated in s. 89 of that Act; they "shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same." Elaborate by-laws have been made and varied from time to time, to which I refer. They regulate the behaviour of vessels coming in "with fish for sale," prescribe where their fish shall be sold, call for the removal of fish within twelve hours of their landing at the markets, and order that goods other than fish shall not be offered for sale in the market, and that no fish shall be sold on a Sunday. They were apparently expressly confirmed by Pollock B. on February 13, 1874.

Since then the fish markets have been extended on ground taken compulsorily under Act of Parliament, and now the buildings called markets and the docks which they adjoin have been enormously extended, and appropriated to various kinds of fish, the trawl market, the herring and mackerel market, at which latter trawl fish are under by-law landed and sold out of the herring season.

The judge below has taken the view that the Acts and by-laws only refer to buildings called "markets," and do not give owners of fish or buyers any rights of sale or purchase therein. I cannot take this view. In my opinion the dock company, having obtained privileges of compulsory purchase of land and increased dues on fish and powers of regulating vessels bringing fish for sale at the markets, and the markets themselves, cannot say, while keeping the privileges of land and dues, and by-laws on which "all persons are justified in acting": "We are entitled to prohibit sales altogether, with the consequent removal of fish sold." The owners of fish brought in for sale have, in my opinion, acquired a statutory right to sell on the quays, under proper regulation, which cannot amount to prohibition. A right to sell on the quay implies a right to bona fide buyers to attend the sales and remove the fish they buy. The present by-law 47 involves the right to fill or pack packages of fish on the quay, to be removed within twelve hours. Two of the present by-laws, 59 and 60, which apparently give the Harbour Master power to prevent any person or vehicle being on the dock premises, must be read subject to preserving the rights as to shipping and unshipping given by the Act of 1847, and of sale and purchase given as the effect of the Act of 1865. If they cannot be so limited, they are, in my opinion, ultra vires and bad.

An instance of the rights and duties involved by accepting a statutory grant of regulations and dues will be found in the House of Lords decision in *Aiton* v. *Stephen*. (1) In that case on land at Boddam fishermen had for long periods carried on their fishing, including, as an incident, beaching their boats on the land in the winter. In 1845 a Local Act established a harbour and authorized the taking of tolls from the fishing-boats by the proprietor. A later proprietor, while taking toll, endeavoured to deprive the fishermen of the right of beaching their boats in winter. The House of Lords negatived his claim. The language of Lord Cairns appears very applicable to the present case; he said (2): "My Lords, if that can be done, the whole Act can be overthrown. The same person may say, I will not allow any boat to come into the harbour. Or he may say, I will allow boats of a particular tonnage, or belonging to a particular nation, to come in. I will pick and choose. My Lords, I apprehend that your Lordships will lay down and maintain this rule, that any person soliciting an Act giving these high powers of charging tolls does it upon the faith of having represented to the Legislature that he would provide the accommodation mentioned in the Act; and that while he exacts the toll, or is in a position to exact the toll, he cannot refuse the accommodation which is pointed out by the Act."

In the present case, the railway company having got the power to charge dues and compulsorily to take land for quays and markets, and to regulate the markets by by-laws, cannot then say: "but I will prohibit all sales, except on any conditions I may choose to impose."

(1) 1 App. Cas. 456.

(2) Ibid. 460.

C. A.
1933

British Trawlers Federation, Ld.
v.
L. and N. E. Ry. Co.

Scrutton L.J.

The dock company argued, and the judge has accepted their view, that even if they could not prevent sale under their by-laws, they could make effective regulations as owners of property, against persons, such as buyers of fish at sales on the quay, who had no rights on their quays, and could therefore be excluded. As in my view such buyers obtained statutory rights by reason of the Act of 1865 and the by-laws made thereunder, the judge's reasoning fails. But I think he has not correctly appreciated the effect of the decision of the Court of Appeal in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (1), in which I was counsel. That case arose in this way: for many years the dock companies had claimed the exclusive right of discharging ships in their dock. A great strike changed their point of view and completely altered their attitude. They then took up the position that they had no duty to discharge ships and would not do it on any terms. Up to that time, large shipowners, such as the P. & O. Company, had had what were called "appropriated berths" to which their ships always came. The dock companies, who were bound by the Act of 1847, put out a series of regulations, not confirmed as by-laws, but covering the same ground as could be covered by by-laws, to which they "required all shipowners to conform." The London shipowners challenged the validity of these regulations. Two substantial points were decided by the Court of Appeal. First, that a shipowner had no right always to have the same berth, but must acquire such a right, if at all, under such terms as the dock company were willing to grant an "appropriated berth" under s. 23 of the Act of 1847. Secondly, that the dock companies having come under certain obligations under the Act of 1847 and regulated them by confirmed by-laws, could not nullify them by unconfirmed regulations to which they "required the shipowners to conform." Lindley L.J. expressed the position in this way (2): "The powers of the company to regulate the use of the docks, quays, and warehouses, and to make charges for their use, depend partly

(1) [1892] 3 Ch. 242.

(2) Ibid. 250, 251.

on the fact that the company is the owner of them and partly on the fact that the company's rights as owner are largely governed by special provisions rendered necessary for the protection of the public. Subject, however, to the restrictions expressly or impliedly imposed by statute, the company can exercise the ordinary rights which are incidental to the ownership of their docks, quays, and warehouses. As owner, the company could make any regulations it might think proper for the use of its property; it could charge what it liked and could shut its docks altogether if people would not comply with its demands. These powers, however, are not unchecked by statute. The Legislature has expressly conferred upon the company many powers which the company, as the owner of property, could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define, that is, limit the right conferred, and as implying a prohibition against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes and authorized to acquire land for such purposes cannot, I think, admit of any doubt." Discussing the regulations in detail, he held that they were not binding on shipowners, except by agreement. Kay L.J. took the same view. Bowen L.J. was equally sarcastic on the "peremptory claims" of the dock company to enforce regulations which he held not to be binding; and the supposed innocence of the P. & O. Company in not knowing that the regulations were not binding. With great respect to that most admirable judge, I do not think he appreciated the difficulties caused in London by the "peremptory insistence" for years by the dock companies on claims which they suddenly abandoned as unfounded.

In my opinion the principle stated by Lindley L.J., with which I entirely agree, binds us in the present case. A company gets from Parliament a grant of rights to acquire lands compulsorily for certain purposes, to be regulated by statutory by-laws requiring judicial confirmation, with rights to the public, on paying certain dues authorized by Parliament. The company cannot say: "I am owner and can destroy any rights of the public by unconfirmed regulations to which I require the public to conform." In the present case the fish trade, the main support of the Lowestoft undertaking, has been carried on for eighty years by vessels bringing fish into the docks for sale, paying dues authorized by Parliament, and selling their fish on the dock quay under regulations imposed by the dock company in manner authorized by Parliament. The dock company, in my opinion, cannot say: "I don't want to stop these sales, but I am entitled to forbid them absolutely, and therefore I can make unconfirmed conditions as to their exercise, not for the purpose of regulating the sales, but for the purpose of preventing competition outside my limits with my railway industries."

It is not necessary to go through in detail the various Acts under which the present extension of docks and markets, all subject to the Act of 1847, has been constructed, or the various by-laws which have been made under the Acts of 1847 and 1865 regulating the fish markets.

I turn now to the declarations granted by the judge in this action. It strikes the eye at once that they have very little to do with the pleadings. There is nothing in the pleadings about the right to sell or buy fish on the dock quays, or about any agreements which form the subject of the third declaration. Indeed, the question of the right to sell or buy is mainly academic. I am satisfied that the dock company has no intention of stopping the sale of the fish brought in by fishing vessels for sale, according to the practice of the last eighty years. The only effect would be to ruin the dock undertaking by sending the fishing trade to the neighbouring market of Yarmouth, where the harbour authorities have no interest in interfering with long-distance motor traffic. The right of sale or purchase has got into the declaration because of the railway company's attempt to justify the terms of the licence by a contention of "no right to come into the dock, except on any conditions we choose to impose." I have held that there is a right on regulated and sanctioned conditions to buy and sell on the dock quay fish coming into the dock in fishing-boats for sale. It follows that the declaration that the plaintiffs have no right to come into the dock to buy or sell fish cannot be supported. No vehicle comes into the dock for the purpose of selling: vehicles come into the dock for the purpose of removing fish unshipped and bought. The dock company can regulate this right but cannot destroy it, especially by imposing conditions as to what the vehicle or its owner shall do with his vehicle or the fish it carries outside the dock. "Cleaning" has got into the declaration by mistake. Some cleaning was done on the quay at Hull, and it was incorrectly assumed that the practice at Lowestoft was the same. But the agreed memorandum as to practice at Lowestoft states: "the cleaning, gutting and washing are done at sea; usually there is no heading or trimming of fish at Lowestoft." A practice of filleting has sprung up at Lowestoft in the last two years relating only to whiting and codling. Part of it is done off the dock company's premises. It forms no part of the dispute between the parties, and may be left to be dealt with till any difficulty really arises. Sorting fish is a very limited matter; trawl fish is sorted into kinds of fish on the trawler. Trawl fish other than cod is sorted to sizes of kinds of fish on the quay before being sold. This again formed no part of the dispute between the parties, and appears to be a kind of lotting incidental to sale. What exactly on the facts at Lowestoft is meant by "preparing for sale" I do not know. The buyer packs the fish he buys into boxes, puts ice on the top, and puts lids on the boxes. Both sides before the judge said they did not want the word "packing" in the declaration. As to the licence to vehicles, which was what the parties were really fighting about, as I have stated, I am of opinion that sellers and buyers have the right to remove goods landed on the dock quay in reasonable vehicles under the regulation of the

Harbour Master, and that the dock company have no right to affix a condition to the admission of such vehicles relating to their use outside the dock premises.

The second declaration will be covered by the declarations made on the claim. I do not think it necessary to make any declaration about rights under agreements. The question was not raised on the pleadings, and the parties thought so little about the matter that the agreements were not mentioned till after the judge had given judgment. The question can be raised when, if ever, the dock company refuse to give any privilege or right in addition to those given under the statute or by-laws, except on terms to which the other parties to the proposed agreements object.

This disposes of the declarations in the judgment. The counsel for the dock company, while supporting them, said they would be content with the following declaration: "The defendants are entitled to prevent the plaintiffs or any of them from taking upon the defendants' dock premises at Lowestoft any mechanically-propelled or horse-drawn vehicles for the purpose of removing therefrom trawl fish which has been sold on the said premises, and the defendants are entitled to grant licences to the plaintiffs or any of them to use such vehicles for the said purpose, and the defendants are entitled to attach to such licences any conditions which the defendants think fit"; to which, if it was thought necessary to have a declaration about sale, they added: "The defendants are entitled to prevent the plaintiffs or any of them from selling fish upon the defendants' dock premises at Lowestoft." It follows from the judgment I have delivered that the railway company are not entitled to this declaration, and indeed, the suggestion that they may impose "any" conditions, however unreasonable or irrelevant, is startling. The condition they seek to impose appears to me to fulfil both qualifications. It is unreasonable, because long-distance transport by lorry is, according to the evidence, quicker and cheaper for the tradesmen, and it enables villages *en route* to be dealt with which are not conveniently served by railway. It is also irrelevant, because it has no relation to the method of unshipping goods on and from the dock premises.

The plaintiffs are entitled to declarations in the terms A, B and C of their statement of claim, but limited to trawl fish. Probably drifters and herrings are in the same position, but in the absence of any person representing that industry I do not feel able to make any declaration on the subject. If these declarations are granted I assume they will be acted on, and I do not think it necessary to grant an injunction at present, but there must be liberty to apply in case the declarations are not acted upon. Again, I do not feel able at present to make any declaration about by-laws 59 and 60, in the absence of any exact information as to how they are used in practice. Confined to regulation, they may be good; if used by way of prohibition of the exercise of rights this judgment has held to exist, they are probably bad. But I would rather decide the question on particular facts. The learned judge's judgment as to declarations must be set aside, and judgment entered for the plaintiffs for their declarations A, B and C respectively, limited to trawl fish. The judgment as to damages must stand. In view of the unsatisfactory way in which both parties dealt with the supposed facts below, the judgment as to no costs below must stand. The appeal in this Court was in the nature of a rehearing, both parties acting very reasonably in supplying the Court with the true facts and relevant documents, and the unsuccessful party, the railway company, must pay the costs of the appeal.

Lawrence L.J. In the month of June, 1930, the defendant company sent a circular letter signed by their London goods manager to all persons concerned in the fishing industry at Lowestoft announcing, in substance, that no motor or horse-drawn vehicle would in future be allowed on the defendant company's dock premises at Lowestoft unless previously licensed by the defendant company, and that the defendant company would only grant a licence upon the following (amongst other) conditions: (1.) that the vehicle would not be used for the transport of fish beyond the dock premises, except in case of fish consigned for transit by railway from Lowestoft or for sale and consumption within a radius of twelve miles of the dock premises; (2.) that no fish transported by the vehicle would be transferred directly or indirectly to or from any other road vehicle for conveyance to any place beyond a radius of twelve miles from the dock premises; and (3.) that the licence might at any time be withdrawn without assigning any reason for such withdrawal. At or about the same time, the defendant company erected wooden barricades across the entrances to their dock premises, which had theretofore been left open to the public highway, and prevented all vehicles which had not been licensed by them from entering those premises. It is plain, on the evidence, that the action thus taken by the defendant company was not rendered necessary by any congestion caused by the vehicular traffic at their docks, but was taken for the purpose of checking the growing competition with their railway undertaking resulting from long distance road transport, and for the purpose of ensuring so far as possible that all the fish landed in Lowestoft harbour and destined for places beyond the twelve mile radius should be transported by rail and not by road.

Ever since the month of July, 1930, all the fish merchants who desired to transport the fish purchased by them at the defendant company's fish markets at Lowestoft by road to places beyond the twelve mile radius have been compelled to remove their fish from the fish markets by means of hand-carts and to load the fish on to their motor lorries in the public highway. The defendant company claimed the right to prevent even hand-carts from coming upon their dock premises, although they have not as yet attempted to exclude such carts. In these circumstances the plaintiffs, who are interested in various ways in the trawl fishing industry at Lowestoft, commenced this action claiming the right to remove all trawl fish landed at the defendant company's docks by the usual commercial methods, including removal by means of motor and other vehicles, and challenging the

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right claimed by the defendant company to impose conditions restricting the places to which fish removed from their premises should be transported, and the manner in which the fish so removed should be dealt with.

The practice with regard to trawl fish, ever since the Lowestoft harbour and docks were opened upwards of eighty years ago, has been that the fish have been cleaned and sorted according to kind at sea on board the trawlers, and that on arrival of the trawlers in the docks the fish have been unloaded on to the quay, where they have been sorted into sizes and then sold by auction to fish merchants, who have removed such of the fish purchased by them as were not loaded into railway trucks at the quay side by horse-drawn or motor vehicles.

Besides the trawl fish trade there is a large trade in herrings and mackerel during a part of the year. These fish are dealt with somewhat differently on arrival in the harbour—the main difference being that only a sample of the catch is taken out of each drifter in the first instance, and this sample is carried to a place in the docks known as the auction mart, where the catch is sold by that sample before being unloaded. As, however, the herring and mackerel trade is a separate industry, and is not represented in this action, our decision in this case is necessarily confined to the trawl fish industry.

In the Court below, the present action was tried immediately after an action brought by the defendant company against certain firms concerned in the fishing industry at Hull, in which action the defendant company claimed the right to exclude all vehicles from their dock premises at Hull, and it was somewhat hastily and, as it turns out, erroneously assumed by the parties and their advisers that the conditions at Lowestoft were similar to those at Hull. After this appeal had been opened it became apparent to this Court that there were important distinctions between the Hull case and the present case, both as to the practice of dealing with the fish and as to the statutory powers of the defendant company. With the aid of counsel, however, we have been able to ascertain all the relevant facts relating to the harbour and

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the fishing industry at Lowestoft, and thus to decide this appeal without having to send the case back for a new trial, a course which both sides were anxious to avoid.

Lowestoft harbour was authorized to be constructed in 1827, in which year an Act was passed incorporating a company of proprietors and empowering that company (inter alia) to make and maintain a harbour with all necessary docks, quays, warehouses and other works at Lowestoft, and for that purpose to purchase land compulsorily, to make rules, by-laws and orders for the management of the undertaking, and to charge the tolls, rates and duties specified in the schedules to that Act. Fish are not specifically mentioned in any of the schedules, but in the body of the Act there is a provision that the decked fishing-boats and vessels employed in the fisheries may use the harbour for importing, landing and delivering white undried or unsmoked fish or for any other purpose connected with the carrying on of the fisheries, paying for that privilege, in lieu of all tolls, rates and duties, the sum of 20*s.* for each boat for the fishing season in each year.

In the year 1846, the undertaking authorized by the 1827 Act became vested in the Norfolk Railway Company, and remained so vested until 1862. There is no evidence to show when the harbour and docks at Lowestoft were constructed, but a number of small books containing the regulations made from time to time by the Norfolk Railway Company for the management of the harbour (the earliest of which books was published in 1850) has been produced to this Court, from the contents of which books the following facts are to be gathered. The harbour and docks were completed at some time before 1850, and the undertakers had before that date provided a fish wharf and fish market on the north side of the harbour where all fish arriving in the harbour had to be landed. At some time before 1859 there existed a clerk of the market, to whom the master of each fishing craft had to deliver a true statement of the quantity and description of the fish landed. There also existed certain recognized salesmen who sold the fish arriving in the harbour in the fish market for the owners of the fishing-boats. The undertakers were empowered to accept the responsibility of these salesmen for the landing dues, and the salesmen were bound to produce their books to the clerk of the market whenever required so to do. In 1860 the regulations relating to the fish market were given greater prominence and were separated from the general regulations of the harbour. These fish market regulations were more elaborate than the previous regulations, and no doubt were drawn up as the result of the experience gained by the company in regulating the sale of fish in their fish market. In 1862 an Act was passed to amalgamate a number of railway companies, including the Norfolk Railway Company, under which Act the Lowestoft harbour and docks undertaking became vested in the Great Eastern Railway Company. In 1865 the Great Eastern Railway Company obtained an Act for the purpose (inter alia) of conferring powers upon that company with reference to Lowestoft harbour. This Act recites that it is expedient that the company should have further powers with reference to Lowestoft harbour for the better regulation thereof and of vessels and the fish market thereat; it incorporates the Harbours, Docks, and Piers Clauses Act, 1847, and provides—s. 14—that in addition to the purposes specified in s. 83 of the Harbours, Docks, and Piers Clauses Act, 1847, for which the company may make by-laws, the company may make by-laws (*a*) for regulating the times for entry and departure into and from the harbour of all vessels and boats whether decked or not decked bringing fish for sale within the harbour, and the moving, stationing and placing thereof, and (*b*) for regulating the fish markets and the places and times for vessels landing their fish and the sale of fish on that part of the company's station known as the fish market or on any other part of the company's property; it further provides—s. 16—that with respect to the fish market the company may lawfully demand and take by way of toll, rate or due (inter alia) for trawl fish landed at the fish market or on any other part of the company's premises a sum not exceeding 2*d*. per package; and it further provides—s. 17—that in order to enable the company to ascertain the quantity of fish landed from any vessel or sold by any salesmen at the fish market or any part of the company's premises and chargeable with duty it should be lawful for the Harbour Master or clerk of the market to examine the books of the salesman or salesmen by whom such fish shall have been sold.

The plain inference from the documents to which I have referred is that, from the time when the harbour and docks were constructed, all the trawl fish landed in the harbour have been sold on the dock premises immediately on arrival, and that the successive owners of the harbour undertaking have always provided a fish market on their dock premises and have regulated the sales thereat.

When the Great Eastern Railway Company took over the harbour and docks undertaking, they were desirous of obtaining wider powers than those contained in the 1827 Act in order to enable them more efficiently to regulate the fish market which was then in operation and any future fish markets which, owing to the increase of the fishing industry in the harbour, it might be necessary or expedient to provide, and accordingly that company sought for and obtained the powers in that behalf contained in the 1865 Act. It is clear that, by that Act, Parliament recognized and sanctioned the practice of selling fish on the dock premises, and conferred upon the company the desired statutory powers of making by-laws to regulate the fish markets on their dock premises and the sale of fish thereat. The effect of incorporating the provisions of the Harbours, Docks, and Piers Clauses Act, 1847, in the 1865 Act, was (inter alia) to make Lowestoft harbour and docks open to the public for the purpose of shipping and unshipping of goods and embarking and landing of passengers—s. 33—and to make all the by-laws passed and confirmed in accordance with the Act binding on all parties—s. 89. In the year 1878, and again in the year 1902, the Great Eastern Railway Company obtained Parliamentary powers to extend their harbour docks and fish markets at Lowestoft and to acquire land compulsorily for that purpose. Under the powers so obtained, the company acquired further land and constructed two new docks (the Waveney Dock and the Hamilton Dock) and greatly extended their fish markets, providing increased facilities for the sale of fish in their new dock premises. After the passing of the 1865 Act down to the present time, the Great Eastern Railway Company have from time to time made elaborate by-laws which have been duly passed and confirmed as required by the relevant statutes for the purpose of regulating the fish markets on their dock premises and the sale of fish thereat.

The by-laws in force in June, 1930, when the defendant company (in whom the Lowestoft harbour and docks undertaking is now vested) issued the prohibition referred to at the commencement of this judgment, contained (inter alia) provisions to the following effect: (1.) Vessels bringing fish for sale within the harbour to moor at or near the proper fish markets; (2.) Vessels bringing fish for sale within the harbour to discharge forthwith; (3.) Trawl and line fish to be discharged and sold at the Trawl Market only; (4.) Herrings and mackerel to be landed in the Hamilton and Waveney markets only and to be sold in the Auction Mart and not elsewhere; (5.) Every person landing fish at the markets or elsewhere shall remove the same or cause the same to be removed therefrom within twelve hours after landing; (6.) All barrels or packages containing fish shall be removed from the fish markets within twelve hours after the commencement of filling or packing the same; (7.) No person shall offer for sale in the markets any article or goods whatsoever except fish; (8.) No person shall sell, buy, pack, prepare for removal or remove any fish in, upon or from the markets or quays on a Sunday; and (9.) Every person guilty of or accessory to any breach of the by-laws shall be liable to a penalty not exceeding *5l.* for every such breach. The by-laws also contain a provision (by-law 59) that no person shall come or remain upon any part of the company's premises unless engaged in and for the purpose of business with or on behalf of the company, except by permission of the Harbour Master, and (by-law 60) no person shall ride, drive any horse or other animal or otherwise propel any vehicle of any description in the markets or on any part of the company's premises without the permission of the Harbour Master. The statement of claim in this action contained a claim that these two last mentioned by-laws were ultra vires, but when the plaintiffs opened their case on this point in the Court below, the defendant company's counsel stated that he did not rely upon those by-laws as justifying the prohibition against long-distance motor vehicles entering the dock premises, and thereupon the plaintiffs' counsel did not develop this part of the case. I would only remark in passing that, prima facie, these two by-laws appear to be in conflict with the rights conferred on the public by s. 33 of the Act of 1847 and with the rights acquired by the public under the Act of 1865, and the by-laws made under that Act. In these circumstances, the question arises whether the defendant company were justified in refusing to allow motor and horse-drawn vehicles to enter their dock premises unless the owners of those vehicles complied with the conditions mentioned at the commencement of this judgment.

It is to be noted that this prohibition has not been embodied in any by-law and that the existing by-laws (inter alia) compel the removal of all fish landed at the market and all packages and barrels of fish within twelve hours after landing, or after the commencement of packing, under severe penalties. It is further to be noted that the condition sought to be imposed upon the trawler owners and purchasers of fish are conditions which relate solely to what is to be done with the fish after removal from the dock premises, and moreover that the defendant company seek to impose an obligation upon the trawler owners and purchasers of the fish (unless sent by rail) to see that the fish are not only sold but also consumed within the twelve miles radius.

The main ground upon which the defendant company seek to justify their action is that they are the owners in fee of the Lowestoft Harbour and Dock Estate and as such are entitled to exercise all the rights of an owner of property, including the right to prevent any person from coming upon their property except upon such terms as they choose to dictate. In support of this contention, the defendant company relied upon the well known railway cases of *Barker* v. *Midland Ry. Co.* (1) and *Perth General Station Committee* v. *Ross* (2) and other cases to the same effect. In my opinion the principle laid down in those cases has no application to the facts of the present case. The defendant company have prohibited the owners of the fish landed on the quays (whether sold at the fish market or not) from bringing any vehicles on to the dock premises for the purpose of removing their fish except upon the condition that the fish so removed shall be transported by rail. The cases referred to might have applied if the prohibition had been confined to vehicles belonging to persons (other than the owners of the fish) who wanted to bring their vehicles into the dock premises on the chance that such vehicles would be hired by the owners of the fish; but that is not the case here.

In my opinion, the provision in s. 33 of the 1847 Act, that upon payment of rates, the harbour and dock shall be open to all persons for shipping and unshipping goods, necessarily implies that all persons shall have the free right to remove the goods landed on the quays by the usual commercial means. The defendant company, no doubt, have power to regulate all vehicular traffic in their dock premises, but that power gives them no right to prevent trawler owners or fish merchants from bringing their vehicles into those premises for the purpose of removing their goods.

The defendant company contended that the process of unshipping goods, within the meaning of the section, ended when the goods were taken out of the ship and placed on the quay, and that the defendant company were under no obligation to admit any person or vehicle to their dock premises for the purpose of removing the goods which had thus been landed, especially when the goods had been sold by the shipowners after having been landed. This contention places far too narrow a construction upon the section. Just

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(1) 18 C. B. 46.

(2) [1897] A. C. 479.

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as the right conferred by the section on the public to ship goods necessarily implies that the shipper shall have the free right to bring his goods to the quay in vehicles in order that such goods may be loaded into the ship, so the right conferred by the section on the public to unship goods necessarily implies that the owner of the goods shall have the free right to enter the dock premises with vehicles in order to remove the goods which have been taken out of the ship. The mere fact that the fish in the course of being unshipped have changed hands on being sold in the fish market on the quay in accordance with the practice which has prevailed at the defendant company's docks ever since they were constructed over eighty years ago does not, in my opinion, interrupt the process of unshipping or prevent the purchaser from completing that process by removing the fish purchased by him. It is to be observed that by the by-laws regulating the fish markets, the trawler owner is compelled to cause the fish landed at the docks to be removed within a limited time, and the manner in which this duty has hitherto been performed by the trawler owner is by selling the fish in the fish market on the quay and getting the purchaser to remove the fish purchased by him. Under the same by-laws, the purchaser of fish in the fish market is compelled to remove every barrel and package containing fish within a limited time after the commencement of filling or packing the same.

The defendant company further contended that if such a right of removal existed it was a personal right and did not entitle either the trawler owner or the purchaser to bring a vehicle upon the dock premises, as the fish could be removed by hand. In my opinion, this contention is not maintainable. The harbour and docks are under the statute open to all persons for the purpose of unshipping goods; this clearly implies that the public is entitled to come upon the dock premises with such vehicles and other means of transport as are usual and proper for the purpose of transporting the goods from the quay to their destination.

The defendant company also contended that, as they were not bound to continue the fish markets, and could stop the sale of fish upon their dock premises, they could, therefore, prevent vehicles from coming on to those premises to take away the fish sold at those markets. In my opinion, this contention is also ill-founded. If the defendant company are entitled to close their fish markets, as to which I express no opinion, and were to exercise that power, there would, of course, be no purchasers of fish who would want to come on to the premises either with or without vehicles; but in that case, the trawler owners would themselves have to arrange for the removal of the fish from the quays and would have the right to employ vehicles for that purpose. So long, however, as the defendant company continue their fish markets—and they have not the slightest intention of closing them—and so long as those markets are regulated by by-laws binding on the defendant company and the public, I am clearly of opinion that the defendant company cannot, at their own will and pleasure, make a regulation preventing that section of the public which prefers to transport its fish by road from entering upon the dock premises with vehicles for the purpose of removing the fish bought in those markets.

In my judgment, the decision of the Court of Appeal in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (1) is directly applicable to the facts of the present case. The defendant company have had large powers granted to them by Parliament on the terms that the Lowestoft harbour and docks would be open to the use of the public and especially of that section of the public which is concerned in the fishing trade, and that trawler owners would be entitled to bring their fish into the harbour for sale within the harbour and to sell their fish at the fish markets provided for that purpose by the defendant company at their docks. Further, the defendant company is, by the Act of 1865, empowered to regulate the manner of using the docks and fish markets at Lowestoft by making by-laws as to the provisions of which the persons engaged in the Lowestoft fishing trade have the right to be heard, and have their objections considered before such by-laws are confirmed

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(1) [1892] 3 Ch. 242.

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and become binding. This power of making by-laws, with its safeguards in the interests of the public, must be considered as having been inserted in the Act of 1865 to define and limit the rights conferred on the defendant company, and implies a prohibition against the exercise of the more extensive rights which the defendant company might otherwise have had by virtue of their ownership of the property upon which the harbour and docks have been constructed. In these circumstances, the defendant company are not entitled otherwise than by by-laws duly passed and confirmed to make regulations restricting the right of the public to enter upon and use the dock premises at Lowestoft for the purpose of removing by the usual commercial methods the fish brought into the harbour for sale and sold within the harbour. It follows that, in my judgment, the restrictions purported to be imposed by the defendant company upon the admission of motor and horse-drawn vehicles to their dock premises are ineffective and unenforceable. For the reasons stated, I agree that this appeal ought to be allowed, and I concur with the terms of the order suggested by Scrutton L.J.

Greer L.J. The plaintiffs in the action (appellants before this Court) are certain companies, firms, and persons interested in the fishing trade at the port of Lowestoft. By their statement of claim they alleged that they had been unlawfully prevented by the defendant company from exercising rights which they claimed to remove fish landed at the defendants' harbour at Lowestoft, or purchased at the market thereon, by the usual commercial methods, including the removal by means of motors and other vehicles, or by agents or contractors on their behalf by such vehicles. They also claimed two other declarations, see (*b*) and (*c*), in the prayer to their statement of claim, which are substantially to the same effect. They claimed an injunction which was consequent on their rights if established, a declaration that two of the defendants' by-laws were unreasonable and void, and they also claimed damages. The claim for a declaration that by-laws 59 and 60 were unreasonable and void was abandoned at the hearing, but this abandonment, in my judgment, does not prevent the plaintiffs from contending in support of their construction of the by-laws that these two by-laws are void and must be disregarded.

The defendants by their counterclaim asked for certain declarations, which are set out in para. 20 of the defence and counterclaim, which were intended to secure a decision that the acts complained of by the plaintiffs were lawful acts by the defendants.

When the case came for trial before the learned judge, the facts relating to the action of the plaintiffs and the defendants, and the practice at Lowestoft with regard to the landing, selling, and delivery of fish were imperfectly ascertained, and in the course of the appeal the parties, in order to enable this Court to deal satisfactorily with the questions involved in the appeal, agreed a written statement of the relevant facts, and this Court allowed that statement to be given in evidence.

In the Court below Branson J. gave judgment, which is said to be a judgment for the plaintiffs, for certain declarations. The declarations are stated in the judgment as follows: "(1.) That subject to declaration No. 3 hereunder the defendants were and are entitled to prevent the entrance of the plaintiffs or of any vehicle employed by or on behalf of any of the plaintiffs on to the defendants' docks at Lowestoft for the purpose of buying or selling or cleaning or sorting fish or preparing it for sale thereon or of conveying fish bought or sold or cleaned or sorted or prepared for sale by them thereon and were and are entitled to attach to any licence given to any of the plaintiffs or to any such vehicle so to enter thereon any requirements and conditions which they might or may think fit including all or any of the requirements and conditions referred to in paragraph 3 of the points of claim. (II.) That the plaintiffs Consolidated Fisheries, Ld., are entitled themselves or by their contractors or agents to remove by the usual commercial methods including removal by means of motor and other vehicles of reasonable size and type from the defendants' docks at

Lowestoft fish landed there by the said plaintiffs, but such right of removal is limited to fish which has not been bought or sold or cleaned or sorted or prepared for sale at the said docks. (III.) That so long as the agreements both dated November 5, 1928, and made between the defendants of the one part and Arthur Valori and R. Craske respectively of the other part remain in force the plaintiffs Valori Brothers are entitled under and subject to the terms of the said agreement between the defendants and Arthur Valori and the plaintiff Craske is entitled under and subject to the terms of the said agreement between the defendants and R. Craske: (*a*) to enter the defendants' said docks for the purpose of buying fish thereon; (*b*) to buy fish upon the said docks; (*c*) to clean and sort and prepare for sale upon the said docks fish so bought by them respectively, and (*d*) to bring on to the said docks for the purpose of conveying fish so bought by them respectively and to use for the said purpose vehicles of reasonable size and type not licensed in accordance with the plaintiffs' said requirements." Though the judgment is described as judgment for the plaintiffs, the only declarations in the plaintiffs' favour are declarations (II.) and (III.). With regard to declaration (III.), as the plaintiffs Valori Brothers and Arthur Craske did not base their claim upon the agreements therein mentioned, no declaration ought to have been made as to their rights under those agreements. Both the plaintiffs and the defendants are dissatisfied with the declarations made by the learned judge, and both appeal.

The questions involved in the appeal depend upon the true construction of the statutes and by-laws under and subject to which the defendants exercise their powers as owners of the harbour and port of Lowestoft, and as owners of the land on which from some date prior to 1850 a market has in fact been held within the precincts of the port.

The first-named plaintiffs, the British Trawlers Federation, Ld., are not traders, but in order to put themselves in order as plaintiffs they in fact purchased a quantity of fish in order to give them a locus standi to make a claim when they were refused permission to remove the fish they had purchased.

by means of a motor lorry. The plaintiffs, Consolidated Fisheries, Ld., are trawl owners who as a general rule land the fish on the dock and sell it there, leaving their purchasers to remove it, but in order to test the respective rights of themselves and the defendants they on one occasion sold fish on the terms that they should deliver it outside the dock, and they were prevented by the defendants from taking the fish they had so agreed to deliver outside the dock by means of a lorry they had engaged for the purpose. The other plaintiffs were purchasers of fish at the fish market, and have been prevented from taking their motor lorries on to the fish market to remove the fish they had there bought. It seems to me that the respective rights of the parties must depend on the true interpretation of the statutes and by-laws subject to which the defendants exercise their rights as owners of the harbour and managers of the port of Lowestoft, exercising the powers given to them by their statutes and by-laws.

No evidence was given at the trial which would justify any finding that the port of Lowestoft was an ancient franchise port or that the market held thereon was an ancient franchise market. The port was first constituted by an Act passed in 1827, and the market seems to have come into existence at some time between 1845 and 1850. The known origin of the port and the market rebut any presumption that might otherwise have arisen by prescription. As Lord Mansfield says in *Hull (Mayor)* v. *Horner* (1): "Any written evidence shewing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription." The earliest statute dealing with the port is the Norwich and Lowestoft Navigation Act, 1827. It is quite clear that this is merely an enabling Act, and that it did not oblige the corporation constituted thereby to exercise the powers there granted. It enabled the corporation to form and maintain one or more basin or basins with proper reservoirs, quays, wharfs, landing places, and warehouses adjoining thereto, in or near Lake Lothing, and also to make

(1) (1774) 1 Cowp. 102, 108.

and maintain at or upon the sea shore or coast a port or harbour with proper piers, jetties, breakwaters, basins, locks and other necessary works respectively. It contained an express provision that they might from time to time alter, repair, amend or discontinue the basins, wharves, quays, houses, warehouses, etc. The statute also contained a power to make such rules, by-laws and orders for the superintendence and management of the undertaking and of the boatmen and others who should carry goods, wares or merchandise upon any part of the said undertaking, or should use any of the works by the Act authorized to be made. The only importance of this Act is to note, first, that it was permissive and not obligatory; and, secondly, that it contained a provision, which appears to have remained in force until the year 1865, that boats or vessels importing, landing and delivering white undried or unsmoked fish should, in lieu of all tolls, rates and duties authorized by the Act, pay the sum of 20*s.* and no more for every such boat or vessel for the fishing seasons in each and every year in which the boat or vessel should enter or use the harbour. Very little progress seems to have been made in the construction of the harbour of Lowestoft under this Act of 1827, and accordingly by a statute of 1845 a company was constituted to take over the powers conferred upon the earlier corporation by the Act of 1827, and further powers were conferred upon the company so constituted. In the next year, 1846, one of the defendants' predecessors, the Norfolk Railway Company, was given power to purchase the Lowestoft harbour and navigation. This Act contains a provision to the effect that the Norfolk Railway Company *shall* execute the works which the Lowestoft Railway and Harbour Company were authorized to construct under the Lowestoft Railway and Harbour Act, and for that purpose shall have, use, and exercise the powers and be subject to the regulations and restrictions by the same Act granted to and imposed upon the Lowestoft Railway and Harbour Company, so that by this Act the completion of the works appears to have ceased to be permissive, and upon the

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Norfolk Railway Company there was imposed an obligation to complete the works which had been begun. By the Great Eastern Railway Act, 1862, the harbour was transferred to the Great Eastern Railway Company (now the London and North Eastern Railway Company), and the Harbours, Docks, and Piers Clauses Act, 1847, was incorporated. Further powers were given to the Great Eastern Railway Company by the Act of 1865, and by s. 12 of the Act the provisions of the Harbours, Docks, and Piers Clauses Act, 1847, were incorporated. Sect. 33 of the general Act so incorporated provides that: "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

By s. 16 of the Act of 1865, in lieu of the 20*s.* per season imposed on fishing-boats delivering fish, certain tolls, rates and dues were imposed in respect of fish landed at the fish market or on any part of the company's premises, and by s. 14 power was given to the company to make by-laws for regulating the times of entry and departure into and from the harbour of all vessels and boats, whether decked or not decked, bringing fish for sale within the harbour, and the mooring, stationing or placing thereof, and for regulating the fish markets and the places and times for vessels landing their fish, and the sale of fish on that part of the company's station known as the fish market or on any other part of the company's property. This is the first mention in any of the statutes which appears expressly to authorize the bringing of fish for sale within the harbour or the holding of any market for the sale of fish on the property of the company. I am disposed to think that before the Act of 1865 it was not within the powers of the railway company as harbour authority to permit sales of fish to take place within the harbour. A company authorized to procure land compulsorily for the purpose of making a port, harbour or dock, would, in my judgment, be exceeding its statutory powers if it utilized the land so acquired for the purposes of a market for the sale of produce. The effect of the decisions with regard to the powers of a company incorporated by statute is thus stated by the learned author of Buckley on Companies, 11th ed., p. 9. Dealing with the distinction between companies created by charter, which are deemed to have all the powers of a natural person, and companies created by statute, the learned author states: "But the corporation created by statute stands in a wholly different position. The statute does not create a corporation at common law. It creates a statutory creature, which cannot go beyond its statute for the reason that to the statute it owes its whole existence: *Wenlock* (*Baroness*) v. *River Dee Co.* (1) A statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined by that Act: *Ashbury Railway Carriage and Iron Co.* v. *Riche.*" (2)

No doubt a corporation created by statute would have all the powers reasonably incident to the exercise of the express powers conferred by the Act constituting the corporation, but it cannot, in my judgment, be derived by reasonable implication from the respondents' statutes relating to the port of Lowestoft before the Act of 1865 that the respondents' predecessors had any power to establish a fish market in the port, or to permit its docks and quays to be used for the auction of fish landed. But I do not think these considerations are of much assistance in determining the questions involved in this appeal, because there can be no doubt that the effect of the provisions of the Act of 1865 was to authorize the company to continue lawfully to carry on the market which had been for some time carried on on their dock premises, and to regulate the market and the sale of fish thereat. It seems to me doubtful, having regard to the express provision contained in the Act of 1846, whether the railway company could or could not abandon the works which they had carried out under the earlier Acts, the statute having said that they "shall" execute those works, but I have no doubt that if they so chose, and conceived it to be in their interests so to do, they could abandon the holding of any market on the dock premises. I have come to the conclusion, however, which I will develop later when I come to deal with some of the authorities which were cited, that as long as they carry on the port they must carry it on subject to the public rights created by s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, and their own by-laws, and that so long as they carry on the market which since the year 1865 they have been authorized to permit, and so long as their existing by-laws continue in force they must carry on their port and their market subject to such reasonable obligations to the public as are involved in carrying on the port subject to the by-laws and in carrying on the market subject to the by-laws. I do not find in any of the subsequent statutes anything material to the questions involved in the appeal, except that they contain several references to the fish market.

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(1) (1883) 36 Ch. D. 675*n.*, 685*n.* (2) (1875) L. R. 7 H. L. 653, 683, 693.

On June 7, 1930, the respondent company without altering their by-laws decided to insist that those who desired to have access by vehicles to their fish docks and quays at Lowestoft should be controlled by a system of licences, and they announced that they would refuse to grant licences to all applicants who were unwilling to give the undertakings contained in a form which they settled as a form of application. The applicants for licences were required to undertake that the vehicle in respect of which they obtained a licence should not be used for the transport of fish beyond the boundaries of the Fish Docks Estate at Lowestoft except in the case of fish consigned for transit by railway from Lowestoft, or for sale or consumption within a radius of twelve miles of the fish docks and elsewhere outside such radius as previously approved by the company. They also required an undertaking that no fish transported by the licensed vehicle should be transferred directly or indirectly to or from any other road vehicle for conveyance to any place beyond a radius of twelve miles from the fish docks. It is obvious that the main object of this procedure on the part of the railway company was to secure that long distance traffic should go by railway from the port, and not by road. In my judgment the company have no power to do what they purport to do by their circular of June 7, 1930, and by the form of application for licence which they required from any person who wanted in the course of his legitimate business to bring a vehicle on to the private roads of the company in the vicinity of the fish docks and quays at Lowestoft. In the first place, I think it is necessarily implied in s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, that their docks and quays should be open to all such persons as were interested in the shipment or unshipment of fish to remove the fish so unshipped by usual commercial methods, including the removal by means of motor or other vehicles, or by their agents or contractors in that behalf by such vehicles. When the statute says that the harbour shall be open to all persons for the shipment and unshipment of goods, the statute is not sufficiently complied with by permitting the persons so interested personal access to the docks. If the privilege granted by s. 33 is to be supposed to be a privilege of real value to the persons engaged in the shipment or unshipment of goods, it must involve that such persons are entitled to remove goods which have been unshipped by any reasonable commercial methods which do not contravene any of the by-laws made by the company for regulating the business of their harbour or docks. It seems to me quite clear that those who land the fish and pay the rates are entitled to use such reasonable commercial vehicles to take away the fish they have so landed from the company's premises and deliver it to any person to whom they may have sold it. It is equally right to say that any merchant who has bought goods before unshipment is entitled by reason of s. 33 to be present at the quay to receive from the ship the goods he has bought, and to remove them by usual commercial methods.

So far I have only been dealing with the rights of persons who can bring themselves within the provisions of s. 33. It may be said that some of the plaintiffs do not bring themselves within that section as they are only purchasers at the market. It seems to me, however, that though the company may possibly be entitled at any time to give up permitting any market to be held, so long as they do under the powers given by their statutes permit such a market to be held, and publish by-laws with regard to it, they must admit the public to the market and give them the opportunity of enjoying by all reasonable commercial methods the privileges conferred upon them by the by-laws, and also by such methods, of performing the duties imposed upon them by the by-laws. So long as the company permit a market to be held on their premises subject to their published by-laws, it is by implication a public market to which buyers are entitled to resort and bring with them vehicles which will enable them to remove the goods that they buy by the usual commercial methods.

Two main contentions were put forward by Mr. Miller in his argument for the defendants: (1.) He contended that inasmuch as the defendants could if they so chose cease to maintain their docks and their fish market, they were entitled to say on what terms they would permit the public to continue to resort to their harbour and their market, and he cited in support of his argument several railway cases, such as *Perth General Station Committee* v. *Ross* (1); *Barker* v. *Midland Ry. Co.* (2); *Foulger* v. *Steadman* (3); and *Bonner* v. *Great Western Ry. Co.* (4) I think these cases do establish the proposition that a railway company has all the rights of an owner in possession to exclude trespassers, and I do not doubt that the respondents as owners of the Lowestoft harbour are entitled to similar rights, but those cases turn on the fact that the people who were complaining that they were excluded from the railway companies' premises failed to establish that the railway companies' statutes gave them any right to be there. If I am right in holding that the plaintiffs are people who have established the right to bring their vehicles to the dock so long as the respondents maintain it as a port subject to the provisions of the Harbours, Docks, and Piers Clauses Act, 1847, the cases cited have no application to their claims. So also if I am right in saying that

(1) [1897] A. C. 479.
(2) 18 C. B. 46.
(3) (1872) L. R. 8 Q. B. 65.
(4) (1883) 24 Ch. D. 1.

so long as a market is held and regulated by the existing by-laws, the plaintiffs can show that this necessarily implies a right of access on their part, with the vehicles reasonably required to remove the goods bought in the market, the cases cited have no application to their claims. Two cases that seem to me to afford the most assistance in deciding the present appeal are *Darlaston Local Board* v. *London and North Western Ry. Co.* (1) and *Aiton* v. *Stephen.* (2) I read the judgments in the *Darlaston* case (1) as meaning that though the company were not bound to continue to maintain a station which they had decided to close, and which they had absolute freedom to use or not to use, still if they did maintain it, while it was so maintained it would be subject to the right of any member of the public to apply to the Railway and Canal Commissioners for an order under the Railway and Canal Traffic Act, 1854, that reasonable facilities should be given for their use at that station. I regard this as an expression of opinion that the power to discontinue the use of a station could not be used for the purpose of showing that while the station continued to exist the defendants would be entitled to use their powers as owners to deprive the public of the facilities which they were entitled to exercise so long as the station was being maintained. In the case of *Aiton* v. *Stephen* (2) certain fishermen residing in the village of Boddam on the east coast of Aberdeenshire, claimed the right, during the winter season, of beaching their boats on certain pieces of ground at or near the harbour of Boddam, they paying the owner of the estate five shillings annually in respect of each boat. They insisted that their right was founded on the common law, and had been used immemorially; and they relied on the provisions of 29 Geo. 2, c. 23, s. 2, but more especially on a local Act with reference to the Boddam Fisheries obtained by the Earl of Aberdeen in 1845. The appellant, on the other hand, maintained that the pieces of ground in question were his exclusive property, "he having succeeded to the rights of the Earl of Aberdeen," and the Lord Ordinary decided in

(1) [1894] 2 Q. B. 694.

(2) 1 App. Cas. 456.

his favour; holding that the right of property was absolute in the appellant, and that the respondents' contention was unsustainable. This judgment the House of Lords held to be wrong. I gather from the report that the power to make and maintain the harbour which had passed from the Earl of Aberdeen to the appellant was permissive and not obligatory, and I treat the judgment of the House of Lords as meaning that inasmuch as the powers had been exercised, and the right to collect tolls from the fishermen had been exercised, the appellant could not rely on his absolute proprietory rights, as this would be inconsistent with his exercising his powers to exact the toll. The Lord Chancellor, Lord Cairns, in his speech says (1): "My Lords, I apprehend that your Lordships will lay down and maintain this rule, that any person soliciting an Act giving these high powers of charging tolls does it upon the faith of having represented to the Legislature that he would provide the accommodation mentioned in the Act; and that while he exacts the toll, or is in a position to exact the toll, he cannot refuse the accommodation which is pointed out by the Act." It will be remembered that the Act of 1865 gave power to the railway company's predecessor to exact a toll on fish landed in place of the twenty shillings per season for which they were under the earlier legislation to use the harbour and land for fish, and so long as these tolls are paid it does not seem right that the railway company should refuse to permit the removal of the fish landed, by reasonable commercial methods.

Mr. Miller also argued that if he was wrong in contending that the railway company as owners were entitled to exclude the plaintiffs, if they so chose, from coming on their premises to attend to the shipment or unshipment of their goods, or to attend the market for the purpose of purchasing or selling fish landed there, the plaintiffs' rights did not arise out of any express grant contained in the statutes or by-laws, and that their rights only arose by implication, and only extended to whatever was necessary to enable them to

(1) 1 App. Cas. 460.

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Greer L.J.

exercise the rights which in this portion of his argument he conceded. He based his argument on the cases dealing with rights of way of necessity, which are held to be binding on a grantor of land which is incapable of enjoyment in the hands of the grantee without assuming a right of way of necessity. In my judgment these cases have no bearing on the question: "What are the implied rights of members of the public who attend a statutory harbour or a statutory market?" I think there is by implication, given by the company's statutes and the by-laws made thereunder, a right to all members of the public to resort to the harbour and the market with such reasonable and usual commercial vehicles as are not prohibited by the existing by-laws. Nothing that I have said in this judgment should be construed as any limitation on the power of the company to prevent congestion arising at their docks and at their market by alterations or additions to their by-laws, if and when they make such alterations or additions and obtain the necessary approval to make them effective. My decision turns wholly on the rights of the public as they are affected by the existing legislation and the existing by-laws.

For these reasons I agree that the appeal of the plaintiffs should be allowed with costs, and the appeal of the respondents dismissed with costs, and the judgment should be for declarations as stated by my Lord.

Appeal allowed.

Solicitors for appellants: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitor for respondents: *I. Buchanan Pritchard.*

J. S. H.

SIMPSON *v.* CHARRINGTON AND COMPANY, LIMITED.

1933
March 16, 17, 20.

Landlord and Tenant—Goodwill—Termination of Tenancy—Compensation—Licensed Premises—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 4, *sub-s.* 1 (*c*).

The tenant of premises licensed for the sale of intoxicating liquor for consumption off the premises claimed, under s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, to be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill. No business other than that of the sale of intoxicating liquor was carried on at the premises:—

Held, that, in view of the terms of proviso (*c*) to s. 4, sub-s. 1, of the Act, the tenant, being the tenant of premises where the sale of intoxicating liquor was the sole trade carried on, was not entitled to compensation under the section.

Appeal from Lambeth County Court.

The plaintiff was the tenant of premises licensed for the sale of intoxicating liquor for consumption off the premises from 1910 to 1932—from 1910 to 1921 under an agreement with the mortgagees of the original tenant and from 1921 until March, 1932, when the lease expired, as assignee of the lease. The defendants were the assignees of the reversion expectant on the determination of the lease. The premises constituted a " holding " within Part I. of the Landlord and Tenant Act, 1927. No business other than that of the sale of intoxicating liquor was carried on at the premises.

On March 24, 1931, the plaintiff gave a notice to the defendants, expressed to be under the Landlord and Tenant Act, 1927, of his claim to be entitled on the termination of his tenancy to compensation for goodwill under s. 4 of the Act (1), but stating that, as the sum that could be awarded him under s. 4 would not compensate him for the loss of goodwill he would suffer if he removed and carried on his business elsewhere, he also claimed a new lease in accordance with s. 5.

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(1) By the Landlord and Tenant Act, 1927, s. 4, sub-s. 1: "The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner— . . . . (ii.) . . . . not more than thirty-six nor less than twelve months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal [i.e., the county court] that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the

In June, 1931, the plaintiff instituted proceedings in the county court, claiming: (*a*) a new lease of the premises under s. 5 of the Act, on the ground that he was entitled under s. 4 to compensation for the goodwill which had become attached to the premises, but that the sum which could be awarded to him would not compensate him for the loss of goodwill he would suffer if he removed to and carried on his trade in other premises; (*b*) certain terms of the new lease; and alternatively, (*c*) the sum of 1700*l.* as compensation under s. 4.

The defendants pleaded that, if any goodwill had become attached to the premises so as to increase their value, it was wholly attributable to (*a*) the fact that the premises were licensed premises, or (*b*) the situation of the premises, or to those two factors together, and, accordingly, no compensation could be recovered by the plaintiff under s. 4. The defendants also denied that the grant of a new lease would be reasonable, and they pleaded that the plaintiff's statutory notice of March 24, 1931, was invalid, as it claimed compensation in the alternative to the claim for a new lease.

The matter was referred under s. 21, sub-s. 2, of the Act to a referee, who reported that the plaintiff had built up a successful business at the premises and had attached a valuable goodwill to them which would enable the landlord to let them at a higher rent than they would have realized had no such goodwill attached to them. The referee also found that the plaintiff would suffer a greater loss if he removed from the premises than the sum which could be

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premises could be let at a higher rent than they would have realised had no such goodwill attached thereto: Provided that— . . . . (*c*) in the case of licensed premises the sum payable as compensation for goodwill under this section shall not include any addition to the value of the premises attributable to the fact that the premises are licensed premises."

awarded as compensation under s. 4, and that the grant of a new lease would be reasonable.

On January 22, 1932, the defendants gave notice to vary the report.

The matter was heard by the county court judge, who held: (*a*) that the plaintiff's statutory notice was not bad because it contained alternative claims for a new lease and for compensation; (*b*) that the plaintiff was not more than a normally good tenant and had not done more than any tenant of ordinary capacity and energy would have done, and had failed to prove that goodwill had become attached to the premises by reason whereof they could be let at a higher rent than they would have realized otherwise; and (*c*) that, even assuming that the plaintiff had, by special exertion, expenditure and skill, caused an addition to the value of the goodwill of the business, he could not claim compensation in view of the terms of para. (*c*) of the proviso to s. 4.

The county court judge, therefore, dismissed the action, and the plaintiff appealed.

Monckton K.C. and *Claude Grundy* for the plaintiff. The county court judge was wrong in holding that in no circumstances could the plaintiff claim compensation because of the terms of proviso (*c*) to s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927. That proviso means, not that the tenant of licensed premises can never obtain compensation, but that he can obtain compensation for goodwill arising from trade which he has attracted to the premises through his energy, initiative and personality, as distinct from trade attracted to the premises merely because they are licensed premises. This appears from the presence of the word "include" in the proviso. If the proviso were intended to have the effect placed on it by the county court judge, it would have enacted simply that "in the case of licensed premises no sum shall be payable as compensation under this section," and proviso (*d*) (ii.), with regard to disregarding mere site value, would be unnecessary. Goodwill attaching to premises because they are licensed premises—which would include increase of value due to increase of population out of proportion to the increase in the number of licensed premises in the locality, and so on—is easily severable from goodwill resulting from the social, advertising or other activities of the tenant.

O'Hagan for the respondent. Where there is a trade consisting of nothing but the sale of intoxicants, proviso (*c*) to s. 4, sub-s. 1, of the Act prevents the tenant from recovering any compensation at all. The question turns on the meaning of the word "attributable," which may mean "entirely attributable" or "attributable in any degree." If it means "attributable in any degree," the judgment of the county court judge must be right, for without the licence there could have been no trade at all. On the other hand, to interpret "attributable" as meaning "entirely attributable" raises the difficult problem of splitting up the commercial goodwill due to the personality and exertion of the tenant from the goodwill attributable to the existence of the licence. The proviso contemplates a business where some other trade is combined with that of the sale of intoxicants. In the case of a hotel proprietor, for instance, there is clearly goodwill apart from the licence, arising from the letting of rooms, sale of meals and so forth. But so much as is due to the existence of the licence, which must, it is submitted, include all the trade in intoxicants, must be excluded from the calculation of compensation. It is to be observed that the similar provision as to site value in proviso (*d*) (ii.) is differently worded. The words there are "attributable exclusively" to the situation of the premises. "Exclusively" is omitted from proviso (*c*).

Monckton K.C. replied.

[The further points indicated in the judgment of Acton J. were also dealt with in argument.]

ACTON J. This appeal raises three questions: first, whether the tenant's claim for a new lease is barred by the form of the statutory notice of claim served on the landlords, in that it claimed compensation under s. 4 of the Landlord and Tenant Act, 1927, alternatively to a claim for a new lease under s. 5; secondly, whether on the correct construction of para. (*c*) of the proviso to s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, this tenant can in any event be entitled either to a new lease or, in the alternative, to compensation; and, thirdly, what are the proper functions of the referee and the county court judge respectively in relation to one another. Of those three questions the fundamental one is the second, for, if the tenant cannot in any event succeed in establishing any claim under s. 4 or s. 5 of the Act either to compensation or to a new lease, it becomes unnecessary to consider questions (1.) and (3.)

The difficulty with regard to proviso (*c*) arises on the question what is really the correct meaning of the words "attributable to" in the proviso. For the appellant tenant it is contended that the meaning of this clause is that in the case of licensed premises three elements have to be distinguished and then considered separately—namely, (1.) the value, in relation to the goodwill, of the premises without any licence; (2.) in addition, the addition to the value consequent merely on the premises having a licence attached to them; and (3.) the value (if any) to the "holding," as distinguished from the "premises," in relation to goodwill, of the personal qualities and activities of the individual tenant or his predecessor. Then it is said that in determining whether a tenant of licensed premises is or is not entitled to compensation and, if so, how much, or whether he is entitled to a new lease, everything is to be disregarded but what is individual to the particular tenant or tenants. For the respondent landlords it is contended that, where the trade or business carried on at the premises is, as here, nothing but the sale of alcoholic liquors, the meaning of the proviso is that the tenant can obtain neither compensation nor a new lease under the Act, the reason being that in such a case any addition to the value of the premises in relation to the goodwill attaching to them must be directly or indirectly attributable to the premises being licensed premises, and that Mr. Monckton's argument puts too narrow an interpretation on the words "attributable to."

It is said that there are many varieties of licensed premises. In some of them no business is done but the sale of intoxicating liquors. In another class, comprising a large variety of licensed premises, substantial business may be done which is separable from, or may be wholly independent of, the mere sale of intoxicating liquors. Illustrations suggested are shops or stores in which an important or even predominant part of the business is dealing in commodities other than alcoholic liquors, and perhaps even residential or luxury hotels, or licensed hydropathic establishments, in which the provision of rooms, meals, service, attendance and entertainments may form a very large part of the goodwill value apart from the mere sale of beers, wines and spirits. It is further said that it is only in one or other of the cases falling within these latter classes of licensed premises that the tenant licensee can become entitled to compensation or to a new lease under the Act, for it is then, and then only, that it becomes possible, or permissible, to draw a dividing line between the addition to the value of the premises attributable to the fact that the premises are licensed premises and the addition to such value by causes not so attributable. In other words, any addition to the value of any licensed premises due to increased profits realized during the tenancy of the tenant or his predecessors by the sale of intoxicating liquors must be deemed to be within the meaning of para. (*c*) attributable to the fact that the premises are licensed premises. It is, as Mr. O'Hagan expresses it, a sine qua non for the realization of such profits that the premises should be licensed premises, and therefore such profits are attributable to the fact that the premises are licensed premises even though the personality, and possibly other exceptionally effective qualities and activities of a tenant or tenants during his or their tenancy, may have caused those profits to be much larger than they would otherwise have been.

Not without doubt, arising from what seems to be the somewhat obscure wording of the clause, I have come to the conclusion that the arguments of Mr. O'Hagan prevail, and that what he contends for is the true construction of the clause in question. In the present case it is not contested that there was carried on in these licensed premises no other trade or business than the mere sale of intoxicating liquors under an off-licence. This being so, it is unnecessary and inexpedient to decide the other points which would otherwise arise, and therefore, in my opinion, on this ground this appeal must be dismissed.

GODDARD J. I am of the same opinion. Sect. 4 of the Act is the section which prescribes the compensation the tenant is to receive and when he is to receive it, and to that section there is a proviso containing several paragraphs. One of those clauses deals with the case of licensed premises, but, before considering para. (*c*) of the proviso, I think that one is bound to consider carefully para. (*a*) of the same proviso, which provides: "The sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title." If for the word "holding" one substitutes the fuller expression which is in the definition clause, it reads: "The sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the premises at which the trade or business is carried on."

I then turn to proviso (*c*), and I find that in the case of licensed premises the sum payable for goodwill under the section "shall not include any addition to the value of the premises attributable to the fact that the premises are licensed premises." It seems to me that, if Mr. Monckton's argument be right, there is really no reason at all why para. (*c*) should be included in the proviso. I think that one must try to give a meaning to the paragraph and assume that Parliament meant to provide something by it in addition to

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what had already been provided in para. (*a*). In my view, the meaning of the paragraph is that where you have a case of licensed premises no compensation is to be given to the tenant for any result which he may have achieved in the carrying on of the premises so far as the sale of intoxicating liquors is concerned. The paragraph is worded in the way in which it is because it was intended to preserve to a tenant who carried on a business additional to that of the sale of intoxicating liquors on licensed premises his right to compensation. I need not repeat the instances given by my Lord in his judgment, but those are the matters, I think, in which it was intended to preserve to the tenant a right to receive compensation, though he is not to receive compensation for any sale of intoxicating liquors which he can carry on, and can only carry on, on licensed premises.

I have not overlooked Mr. Monckton's argument, founded on para. (*d*). It does seem there at first sight that the proviso is redundant where it directs the tribunal to disregard any value which is attributable exclusively to the situation of the premises, because what is attributable exclusively to the situation of the premises cannot be said to be a direct result of the carrying on of the trade or business. Whether that is merely redundant or not cannot, in my judgment, affect the construction which we ought to put upon proviso (*c*), but I do not feel at all convinced that that part of para. (*d*) is merely redundant. Mr. Monckton has argued that, as that is or may be redundant, or inserted merely, as he put it, ex abundanti cautela, we ought to regard para. (*c*) of the proviso as put in for the same purpose. I think it more likely that the second paragraph in (*d*) should be regarded as not necessarily redundant, but as meant to deal with the case where some peculiar facility is given to the tenant by reason of the site, and the tribunal is, therefore, directed, though it must be a difficult thing to do, to make a deduction from the goodwill which has been worked up by reason of the valuable site. However that may be, and whatever may be the true construction or the true reason of the second sub-section of para. (*d*), I entirely agree with the reasons which have been given by my Lord as to the true construction to be put on para. (*c*), and I, therefore, agree with him that the goodwill in this case, where the business consists wholly of the sale of intoxicating liquor, is ruled out, and that the tenant is not entitled to compensation in respect of it.

I agree, therefore, that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for appellant: *Sprinz & Sons.*
Solicitors for defendants: *Loxley, Gardner & Sewell.*

G. F. L. B.

DONOVAN AND ANOTHER *v.* UNION CARTAGE COMPANY, LIMITED.

1932
Dec. 1, 9.

Negligence—Stationary unhorsed Van in Public Street—Habits of Children—Duty in Relation to Children—Allurement—No inherent Danger—Child climbing Van—Child a Trespasser—Owner of Van not liable for Accidental Injury to Child.

An unhorsed van belonging to the defendants was left by them, unattended, in a public street, outside their premises. The younger plaintiff, an infant, aged seven years, while playing in the street with other children, climbed on to the van, fell and was injured. In an action for negligence:—

Held, that the defendants, the owners of the van, were not liable, because (1.) there was no inherent danger in a sound, stationary and immobile vehicle, left unattended in the street; and (2.) even if the stationary van was an obstruction to the use of the highway, there was no relation of cause and effect between an obstruction to the use of the highway and the occurrence of the accident.

Lynch v. *Nurdin* (1841) 1 Q. B. 29 distinguished.

Latham v. *R. Johnson & Nephew, Ld.* [1913] 1 K. B. 398 applied.

APPEAL from Bow County Court.

On August 6, 1932, an unhorsed van belonging to the defendants had been left by them, unattended, in the street outside their premises in Bow Common Lane, London, E.C.

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Co.

The younger plaintiff, an infant of seven years of age, while playing in the street with some other children, climbed on to the van. He slipped or fell and was injured.

The infant plaintiff (suing by his father and next friend) brought an action in the county court, claiming damages from the defendants for alleged negligence. The plaintiffs alleged that the defendants were negligent in leaving the unattended van in the street, where it was an allurement to children of tender years. They also alleged that the defendants knew that young children were in the habit of playing in the street. The plaintiffs also based their claim on nuisance, alleging that the defendants' act in leaving the van in the street, in the circumstances, was a nuisance.

By their defence, the defendants said that the infant plaintiff's injury, if any, was caused by his own negligence or contributory negligence, in that he was of an age to know that climbing on to the van was dangerous and that he failed to take reasonable care. The defendants also said that the infant plaintiff was a trespasser, and that he knew of and impliedly agreed to accept the risks involved in climbing on to the van.

Evidence was given in the county court that it was customary for the defendants to leave the van in the street, that they must have known that children played in the street, and that the van was left in the street at a time when the children usually played in the street.

At the conclusion of the plaintiffs' case the county court judge ruled that there was no case to go to the jury, and gave judgment for the defendants with costs.

The plaintiffs appealed.

Weitzman for the plaintiffs.

G. Granville Sharp for the defendants.

Cur. adv. vult.

1932. Dec. 9. ACTON J. delivered the judgment of the Court (ACTON and TALBOT JJ.). This is one of the cases in which it is contended that liability arises from the established duty in relation to children to take care not to leave that which may be dangerous to them, if meddled with, in any place where they may be able to reach it without interference, protection, or control, and it is probable that they may be allured or attracted to it, through the propensities common to children. It is said, accordingly, that to leave a vehicle such as a stationary van, even with no horse attached to it and in an immobile condition, in a public street in which young children are known to be in the habit of playing, and at a time when they are likely to be doing so, is a breach of this duty; and that if a child, in such circumstances, climbs on to such a vehicle and falls from it and is thereby injured, liability in damages is incurred by the person who so leaves it.

The contention is that the present case is within the principle of *Lynch* v. *Nurdin* (1) and other similar cases. That principle is explained by Lord Atkinson in *Cooke* v. *Midland Great Western Ry. of Ireland* (2) in the following words: "The authorities from *Lynch* v. *Nurdin* (1) downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred."

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(1) 1 Q. B. 29.

(2) [1909] A. C. 229, 237.

There is, however, a distinction between these cases and the present case, which, in our opinion, is a valid distinction, and, as indicated by Lord Atkinson, it is supported by authority. The cases in which it has been held that liability arises appear to have one common feature—namely, that the object left unattended and accessible to children, and likely to be an allurement to them, possessed some attribute which rendered it dangerous in itself, and it was in consequence of its possession of this attribute that the accident happened and the injury ensued. It may be that the object is dangerous through being actually in motion, or liable to be easily set in motion, or poisonous or deleterious to eat or handle, or explosive, or so defective in some way as to be inherently dangerous. There is, in our judgment, no such element of inherent danger in a sound, stationary and immobile vehicle, such as the van in the present case. To extend the principle of *Lynch* v. *Nurdin* (1) to things in no way dangerous in themselves, left unattended in a street (or in other places open to the public, such as parks, pleasure grounds, or open spaces), would be to impose burdens of responsibility so far-reaching and incalculable as to be unreasonable and intolerable. It cannot be said that, even if such things are likely to attract children, there is in them anything in the nature of a trap or a concealed peril.

The distinction here drawn is best illustrated by the decision in *Latham* v. *R. Johnson & Nephew, Ld.* (2) In that case Hamilton L.J. (now Lord Sumner) said (3): "Two other terms must be alluded to—a 'trap' and 'attraction' or 'allurement.' A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps

(1) 1 Q. B. 29.
(2) [1913] 1 K. B. 398.
(3) Ibid. 415.

on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation. 'Allurements,' too, is a vague word. It may refer only to the circumstances under which the injured child has entered the close. Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object. Finally, what objects which attract infants to their hurt are traps even to them? Not all objects with which children hurt themselves simpliciter. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap." Then again, Hamilton L.J. says (1): "One asks what kind of chattel it is in respect of which its owner owes a duty of care towards strangers, equally whether it is in a public place or on his own premises, and equally whether the strangers are invited or only licensed. There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in

(1) [1913] 1 K. B. 398, 419.

which its owner suffers it to be. Danger is relative. What property must the chattel possess to make the consideration of its attractiveness to children relevant ? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation. Hence, in my opinion, in any view of it, the decision in *Cooke's* case (1) is a decision on traps for children. Each of the four opinions says so. I refer to p. 236 : 'But it does not seem unreasonable to hold,' etc. ; p. 240 : 'These latter' (the defendants) 'owed to the child a duty not to permit the machine to be in the movable and dangerous, because movable, condition in which they permitted it in fact to be' ; p. 241 : 'The turntable . . . . was a dangerous thing for young children to play with,' and p. 242 : 'A machine, dangerous unless protected.' The argument that the question for the jury, as stated by Lord Macnaghten on p. 234, gives the decision a wider scope is fallacious. It ignores the fact that Lord Macnaghten is speaking of 'the' turntable in question and of that machine as 'attractive to children and dangerous as a plaything,' an observation which he directs to the consequences which ought to be foreseen by a reasonable man as resulting from his own acts or omission, if the acts of other persons intervene, and with which he concludes his speech. The question was vital because Cooke had been put on the turntable by other boys, who then revolved it, he being purely passive, and the remoteness of his consequent injury had been relied on. Indeed, it is one which generally arises in children's cases and is characteristic of them." It may be worth notice that Hamilton L.J.'s judgment in *Latham* v. *R. Johnson & Nephew, Ld.* (2), was approved and adopted in the House of Lords in *Addie* (*Robert*) *& Sons* (*Collieries*), *Ld.* v. *Dumbreck.* (3) There is also a Scottish case which, though not binding upon English Courts, deals expressly with the distinction now under consideration. This is the case of *Duff* v. *National Telephone Co.* (4) The headnote in that case is : "The owner of a two-wheeled barrow left it in a lane in a town. Two children began to play on the barrow, and while doing so brought it down on and fatally injured a child of three years who was playing with them. In an action of damages at the instance of the father of the child against the owner of the barrow the pursuer averred that the barrow had been left unguarded in the open lane, and that no precaution had been taken against such an accident as had occurred. The Court dismissed the action as irrelevant." Lord Shand, in giving judgment, said (1): "In all the cases which have previously occurred the complaint has been that an article dangerous in itself has been left unguarded in an exposed position. It is not perhaps easy to define what the word 'dangerous' precisely means when used in cases of this kind, but I think that the cases we were referred to explain themselves and define the term. In . . . . *Macgregor* v. *Ross & Marshall* (2) and *Campbell* v. *Ord & Maddison* (3), the articles so left were machines which would be dangerous if set in motion, which they might easily be. In *Findlay* v. *Angus* (4) the article was a heavy shutter, which was quite harmless if untouched, but which was so placed that a very slight movement of a pin would bring it down. Again, a horse left in the street without any one to take care of it might be most dangerous, but I think it is extravagant to say that an ordinary wheelbarrow is a dangerous article in any sense, and I do not think that in leaving it in the lane the defenders did anything which can afford ground for an action of damages. The wheelbarrow might be an obstruction in the street or lane, but I think the statements made here on record are quite irrelevant to found a claim for damages on the ground of fault."

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(1) [1909] A. C. 229, 236, 240, 241, 242.
(2) [1913] 1 K. B. 398.
(3) [1929] A. C. 358, 367, 370.
(4) (1889) 16 R. 675, 676.

In the present case it was strenuously argued, in order to distinguish it from *Latham* v. *R. Johnson & Nephew, Ld.* (5), that the van in the condition in which it was left was an obstruction of the highway, and therefore a nuisance, and that for that reason the defendants are liable. The

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(1) (1889) 16 R. 676.

(2) (1883) 10 R. 725.

(3) (1873) 1 R. 149.

(4) (1887) 14 R. 312.

(5) [1913] 1 K. B. 398.

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answer to this is that, even upon the assumption that the van was a nuisance—which upon the evidence at the trial is not clear—the accident did not happen because the van was an obstruction to the highway, but because the child trespassed upon the van: see *Lynch* v. *Nurdin.* (1) The child's user of the highway was not in any way obstructed or interfered with or rendered perilous by the van being on the highway. If an adult climbs upon a stationary vehicle left on the highway to see a cricket match or a horse-race, and falls off and injures himself, it is not relevant for him to complain that the van was an obstruction to the highway and a nuisance. That gives him no right to get upon it, and in relation to this particular point there seems to be no valid distinction between an adult and a child: see per Lord Macnaghten in *Cooke* v. *Midland Great Western Ry. of Ireland.* (2) On the other hand, *Lynch* v. *Nurdin* (3) is an authority that in an action by a child the fact that he was unlawfully on a vehicle in a public highway is no defence for the person who left it there if the vehicle was in itself both an attraction to children and dangerous: see also the short judgment of Rigby L.J. in *Harrold* v. *Watney.* (4)

In *Wilkins* v. *Day* (5), which was cited for the plaintiff, it was the lawful user of the highway by a person driving a carriage along it that was rendered dangerous by the existence of an obstruction upon it, and it is upon this that the decision in that case rests. In the present case there is no relation of cause and effect between an obstruction to the user of the highway and the occurrence of the accident.

For these reasons, in our judgment, this appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs: *Silkin & Silkin.*
Solicitors for the defendants: *Cole & Matthews.*

(1) 1 Q. B. 29, 36.
(2) [1909] A. C. 229, 234.
(3) 1 Q. B. 29.
(4) [1898] 2 Q. B. 320, 324.
(5) (1883) 12 Q. B. D. 110.

T. W. M.

SCHALIT *v.* JOSEPH NADLER, LIMITED.

1933
March 15, 21.

Landlord and Tenant—Rent—Recovery—Trust Property—Distress by Cestui que Trust—Legality—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 141, *sub-s.* 2.

The Law of Property Act, 1925, s. 141, sub-s. 2, provides that rent reserved by a lease "shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled . . . . to the income . . . . of the land leased."

This sub-section, which deals only with procedure, means that a person who is entitled to the rent to the exclusion of all others can recover it, although, but for the sub-section, he would not have been able to sue in his own name, but would have been obliged to use the name of the person in whom the legal estate was vested. The sub-section does not entitle a cestui que trust to distrain for rent in respect of the trust property merely because he is beneficial owner of that property.

J. N. sublet to the plaintiff part of certain premises which he himself held under a long lease. J. N. then executed a declaration of trust by which he declared that he held the property in trust for J. N., Ld. The plaintiff having fallen into arrear with his rent, J. N., Ld., distrained. In an action for illegal distress:—

Held, that J. N., Ld., were not entitled to distrain.

Turner v. *Walsh* [1909] 2 K. B. 484 discussed and explained.

APPEAL from Westminster County Court.

By a lease dated March 25, 1924, and made between one Leon Edelshain, as lessor, and one Joseph Nadler, as lessee, certain premises numbering 92 to 98 Shaftesbury Avenue, London, were demised to the lessee for the term of ninety-nine years, less twenty-one days, from June 24, 1923, at a yearly rent of 1000*l.*, subject to the covenants by the lessee and the conditions therein contained.

By a tenancy agreement dated December 20, 1929, and made between Joseph Nadler, as landlord, and the plaintiff Maximilian Schalit, as tenant, the landlord let to the tenant a suite of offices or rooms on the first floor of No. 94 Shaftesbury Avenue from December 25, 1929, for the term of two years at a rent of 250*l.* a year.

By a declaration of trust dated September 18, 1931, between Joseph Nadler and the defendant company, Joseph Nadler, Ld., Joseph Nadler declared that he held, and would continue to hold, the property demised by the lease of

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March 25, 1924, "in trust for the company absolutely to sell let or otherwise (wholly or in part) as the company may direct or appoint and in the event of any such sale or letting to hold the net proceeds thereof upon trust for the company to invest or otherwise as the company may direct."

On October 31, 1931, the plaintiff's rent under the agreement of December 20, 1929, was 44*l.* in arrear, and on that day the bailiff, on the instructions of the defendant company, entered the premises let to the plaintiff and seized and distrained certain goods and chattels in respect of the rent which was owing.

On November 20, 1931, the plaintiff instituted proceedings in the High Court claiming damages for illegal distress. The case was remitted to the county court, and the county court judge decided it in favour of the plaintiff against both defendants, assessing the damages at 35*l.*

The defendants appealed.

Vaisey K.C. and *de Ferrars* for the defendants. The county court judge was wrong. The defendant company, as cestui que trust and beneficial owner of the receipts from the property, were entitled to the income of the whole or part of the property leased within s. 141, sub-s. 2, of the Law of Property Act, 1925. (1) Under that sub-section, therefore, the company were entitled to recover and enforce payment of the rent reserved: see Foà's Landlord and Tenant, 6th ed., pp. 126, 127, 493; Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., p. 476. This case is a fortiori *Turner* v. *Walsh* (2), which was decided under s. 10 of the Conveyancing and Law of Property Act, 1881, the relevant part of which section is now replaced by s. 141, sub-s. 2, of the Act of 1925.

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(1) By the Law of Property Act, 1925, s. 141, sub-s. 2: "Any such rent [i.e., rent reserved by a lease], covenant or provision [having reference to the subject-matter of the lease, and on the lessee's part to be observed or performed] shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

(2) [1909] 2 K. B. 484.

Swords K.C. and *Bensley Wells* for the plaintiff. The person in the present case who is entitled to the income of the property is not the company but the trustee, who has to pay the rent which he has covenanted to pay under the lease of March 25, 1924, and to perform the other covenants of that lease. A trustee who alone can sue for rents and profits is none the less the beneficial owner of the property because he has to account to his cestui que trust: per Scrutton L.J. in *Allen* v. *Inland Revenue Commissioners*. (1)

Vaisey K.C. replied.

Cur. adv. vult.

March 21. The following judgment of the Court (ACTON and GODDARD JJ.) was read by

GODDARD J. This is an appeal from a judgment of the late Judge Turner whereby he gave judgment for a plaintiff in an action for wrongful distress, assessing the damages at 35*l*. The ground on which it was alleged and held that the distress was wrongful was that it had been authorized only by the defendant company, who were not the landlords, but the defendants contended, and contend in this appeal, that the defendant company was by virtue of s. 141, sub-s. 2, of the Law of Property Act, 1925, a person entitled to recover, receive, or enforce the rent of the premises in question and that consequently the distress was valid. [His Lordship read the sub-section, stated the facts and continued :] It was contended that the company as cestui que trust of the landlord was a person entitled to distrain, and the only question in the appeal is whether this contention is sound. In opening the appeal Mr. Vaisey contended that Joseph Nadler was a bare trustee for the company, and that consequently the latter was entitled to the income arising from the property and, no doubt, it is true that they were beneficially interested in the proceeds of the underletting; but, if this argument means that the trustee has no interest at all in the underlease other than a bare legal estate, we cannot agree with the contention. The trustee

(1) [1914] 1 K. B. 327, 337.

was personally liable to the superior landlords for the rent and the due performance of the covenants, and he was entitled to reimburse himself out of the rent collected from the sub-tenant for the rent or any other outgoings that he as trustee for the company had to pay. It was the net proceeds that he was to hold in trust. If the case, therefore, merely depended on whether Joseph Nadler, the lessor of the plaintiff, was a bare trustee for the defendant company with no interest in the underlease, we have no hesitation in deciding that he was not.

But we do not think that the appeal ought to be decided on this narrow ground, as Mr. Swords for the respondent has contended that in no circumstances does the section entitle a cestui que trust to recover or enforce the rent, and it seems to us that the argument of Mr. Vaisey does involve the contention that when a lease is granted by a trustee the cestui que trust can always intervene and demand, sue or distrain for the rent reserved. It is admitted that the trustee is a person who can sue or distrain for the rent, and his right to do so arises because he, and he alone, is the lessor. The respondent contends that the section is not to be construed as meaning that, when there is a lessor entitled to the rent as between himself and the lessee, some other person can also, or alternatively, be entitled thereto. If it were so, the result would be that at least two persons would have a concurrent, or, at least, an alternative, right to the rent. Each would apparently be entitled to demand it and, although it is conceded that if payment were made to one it would be a defence to a demand by the other, it appears to follow that if the tenant delayed payment, being in doubt whom to pay, he might find that two distresses were put in or two writs were issued against him simultaneously.

In our judgment the section cannot be so construed. We think it means that a person entitled to the rent to the exclusion of all others can recover it, although, but for the section, he would not have been able to sue in his own name, but would have been obliged to use the name of the person in whom the legal estate was vested. It is a section

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dealing only with procedure. Mr. Vaisey relies on *Turner* v. *Walsh* (1) as an authority to support his contention. That was a case of mortgagor in possession, who has always been held in equity to be entitled to receive and recover the rents of the mortgaged property until the mortgagee enters into possession. But the case does not decide that, if the mortgagee does enter into possession, the rent can be demanded or recovered either by him or by the mortgagor. On the contrary, it seems to us that it decides that it is the mortgagor in possession and he alone who is entitled to the rents until the mortgagee enters, and that the section enables him, as the owner in equity, to sue in his own name, while at common law he would have been obliged to use the name of the mortgagee. It is no authority for saying that both mortgagor and mortgagee are entitled to sue for, or otherwise enforce, it.

But there is another and, it seems to us, fundamental objection to the appellants' case. The right of the cestui que trust whose trustee has demised property subject to the trust is, not to the rent, but to an account from the trustee of the profits received from the demise. If authority be needed for this proposition, it is to be found in the judgment of Scrutton J. in *Allen* v. *Inland Revenue Commissioners.* (2) The cestui que trust has no right to demand that the actual bank-notes received by the trustee shall be handed over to him or that a cheque for rent drawn to the trustee shall be indorsed over. What he can require is that the trustee shall account to him, after taking credit for any outgoings or other payments properly chargeable, for the profits received from the trust property.

Mr. Vaisey has called our attention to passages in the latest editions of Foà's Landlord and Tenant and Wolstenholme and Cherry's Conveyancing Statutes, in which the authors of those standard text-books express the opinion that rent can be recovered by beneficial owners, and each cite in support the case of *Turner* v. *Walsh* (1), to which we have already referred. For the reasons given above,

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(1) [1909] 2 K. B. 484.

(2) [1914] 1 K. B. 327, 337.

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we do not think that the case in question supports the proposition that a cestui que trust can sue or distrain. Were it so, the position of a tenant whose lessor was in fact, though unknown to him, a trustee might indeed be unenviable. Having been accustomed, perhaps for years, to pay his rent to the person appearing in his lease as lessor, he might be faced with a demand without previous notice from some one of whom he had never heard, with the prospect that, before he had had time to interplead, a distress might be levied at the instance of both the cestui que trust and the trustee and apparently neither would be wrongful. Against the opinion of the eminent text-book writers quoted above is the fact that, although the provisions of this section, either as s. 10 of the Conveyancing and Law of Property Act, 1881, or as s. 141, sub-s. 2, of the Law of Property Act, 1925, have been in force for over fifty years, not only is there no reported case in which the cestui que trust has ever been held entitled to sue or distrain for the rent, but neither counsel, whose experience in these matters is very wide, has been able to tell us of any case within their knowledge where such a claim has ever been made. The appeal is dismissed with costs.

Appeal dismissed.

Solicitor for defendants: *J. Nadler.*
Solicitor for plaintiff: *L. Fior.*

G. F. L. B.

POUNDER *v.* LONDON COUNTY COUNCIL.

1933
March 13, 31.

[1932. P. 1255.]

Poor Law—Superannuation—Service of Officer with Guardians conferring Benefits under Poor Law Officers' Superannuation Act, 1896*—Transfer to County Council having no Superannuation Scheme—Resignation—Contract of Service with another County Council conferring Benefits under Asylums Officers' Superannuation Act,* 1909*—Applicability of Act of* 1896 *or* 1909*—Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *ss.* 119, 124, *sub-s.* 1; 134.

The plaintiff, a porter, under the provisions of s. 119 of the Local Government Act, 1929, was transferred to the service of a county council having no superannuation scheme applicable to him. Sect. 124, sub-s. 1, enacted that in such circumstances the provisions of the Poor Law Officers' Superannuation Act, 1896, should apply to him, and "shall continue so to apply to him so long as he is in the service of the council of any county." He afterwards resigned and then entered into a contract of service with the defendants, another county council, which had a superannuation scheme under the Asylums Officers' Superannuation Act, 1909. The plaintiff claimed to be entitled to the benefits of the latter scheme and to be no longer under the Act of 1896:—

Held, that the Act of 1896 continued to apply to him, as he was in the service of a county council though by contract only and not as a transferred officer. The words of s. 124, sub-s. 1, "service of the council of any county" covered his service with the defendants as well as that with the council to which he had been transferred.

ACTION tried by Talbot J.

The plaintiff was in April, 1928, in the employment of the Dursley Board of Guardians as a porter, and, as such, came within the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50). Under the provisions of s. 119 of the Local Government Act, 1929 (19 Geo. 5, c. 17), he was transferred to the service of the Gloucestershire County Council on April 1, 1930, in his former capacity of porter. The council had no superannuation scheme applicable to him and accordingly, under the provisions of s. 124, sub-s. 1, of the Act of 1929 (1), the Act of 1896 still applied to him. On

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(1) Local Government Act, 1929, s. 124, sub-s. 1: "Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896 . . . . have been made is, by virtue of this Act, transferred to the service of any council, then, if the council to whose service he is transferred have no superannuation scheme or if, in

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June 8, 1930, he resigned, having applied to the defendants, the London County Council, for employment as a male nurse in the Claybury Asylum. He was duly so appointed on June 9, 1930.

The plaintiff asked for a declaration that he was entitled to the benefits of the Asylums Officers' Superannuation Act, 1909 (9 Edw. 7, c. 48), as being applicable to his employment with the defendants, and that he was no longer within the Poor Law Officers' Superannuation Act, 1896. No statutory provisions for the superannuation of persons employed by the councils of all counties and county boroughs, referred to in the latter part of s. 124, sub-s. 1, of the Act of 1929 (1), had in fact been made.

The plaintiff had left his quarters with the Gloucestershire County Council at 12 o'clock noon on June 9, 1930, and had arrived at the asylum and taken up his duties about 4 P.M.

Cyril Atkinson K.C. and *Sir G. W. H. Jones* for the plaintiff. The plaintiff has ceased to be under the Poor Law Officers' Superannuation Act, 1896, and, on entering the service of the defendants, automatically became subject to the provisions of the Asylums Officers' Superannuation Act, 1909. Between the cesser of his employment by the Gloucestershire County Council at 12 noon on June 9 and the commencement of his employment by the defendants at 4 P.M. a period of time elapsed, during which, by his own act, he was employed by nobody. The position during that period of unemployment was that the scheme under the Act of 1896 did not apply to him as he had ceased to be employed by the council, and the scheme under the Act of

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the case of an officer transferred to the service of a council who at the appointed day have such a scheme, he gives, within three months after the appointed day, notice in writing to that council that he elects to remain subject to the provisions of the Act of 1896, that Act shall apply to him . . . . and shall continue so to apply to him so long as he is in the service of the council of any county or county borough until, under such statutory provisions as may be made for the superannuation of persons employed by the councils of all counties and county boroughs" a scheme is made.

Sect. 134: "In this Act unless the context otherwise requires . . . . 'Officer' includes servant."

(1) See note (1) ante, p. 85.

1909 did not apply because he was not in the employment of the defendants, but that it applied automatically as soon as he entered their service. But he was no longer a transferred officer; he had made a fresh start. The object of s. 124, sub-s. 1, is that no officer shall be worse off by reason of being transferred under s. 119 of the Act in the case where the council to which he has been transferred has no superannuation scheme. In order that the words of s. 124, sub-s. 1, "so long as he is in the service of the council of any county" shall apply, continuity of service is contemplated. If the contention of the defendants is correct the plaintiff is saddled with the superannuation scheme under the Act of 1896 wherever he is employed by a council, in whatever capacity and however long a period has elapsed since his employment by the Gloucestershire County Council. This seems to be an absurdity.

Somervell K.C. and *Lancelot Fletcher* for the defendants. The Act of 1929 was dealing with persons in the employment of bodies about to be abolished and who were to be transferred to other bodies. Something had to be done for these persons in the case where the bodies to which they were to be transferred had no superannuation scheme applicable to them. Sect. 124, sub-s. 1, accordingly enacts that the old Act of 1896 shall still apply to them, and extends the privilege to cover them while employed by any council. "Any" covers the council to which the officer is transferred and also any council by which he is employed. Where, as was the case here, the council to which the officer or servant is transferred has a superannuation scheme he is given the option of remaining under the Act of 1896 or of coming under the scheme; and it was contended by the plaintiff that the option given to an officer when transferred should be given also to one who has not been transferred but is in the employment of a council under a contract. There is nothing in the Act to that effect; it gives the option to transferred officers only. It is immaterial that there was a gap—if indeed there was a gap—between the plaintiff's employment by the Gloucestershire council and his employment by the defendants: see s. 4 of the Act of 1896. The defendants' interpretation of the sub-section may constitute a hardship on the plaintiff; but the sub-section clearly says that if the plaintiff is transferred to a council not having a superannuation scheme the Act of 1896 shall apply. He was so transferred. It then says that it shall continue to apply to him as long as he is in the service of any council. He is in the service of a council. Therefore the Act of 1896 still applies to him.

Cyril Atkinson K.C. in reply. Sect. 4 of the Act of 1896 only applies to the case where the officer after a period of absence returns to his old employment.

Cur. adv. vult.

1933. March 31. TALBOT J. read the following judgment: The plaintiff in this action was engaged in April, 1928, as a porter in the service of the Dursley Board of Guardians and, as such, came within the Poor Law Officers' Superannuation Act, 1896. By s. 119 of the Local Government Act, 1929, he was on April 1, 1930, transferred to the service of the Gloucestershire County Council, and up to June 8, 1930, he was a servant of that council in his former capacity of porter, and was still within the Act of 1896, the Gloucestershire County Council having no superannuation scheme applicable to him. On June 8, 1930, he resigned, having applied to the London County Council for employment as a male nurse in an asylum. He was duly appointed by the London County Council a male nurse in the Claybury Asylum on June 9, 1930. The question between the parties to this action is whether since this he has remained subject to, and with the benefit of, the superannuation provisions of the Act of 1896, or has become entitled to the benefits of the Asylums Officers' Superannuation Act, 1909. The plaintiff maintains the latter, the defendants the former. It is not necessary to go into the differences between the two Acts; it is not disputed that for the plaintiff the Act of 1909 is the more advantageous. He is within class I. as defined in s. 1, sub-s. 1, of the latter Act.

The plaintiff contends that he was unemployed for at least a few hours on June 9, and entered the service of the defendants after this interval. The defendants are content (without admitting that this is true in fact) to treat the case on this basis, inasmuch as their case would be the same if there had been an interval of several years between the employment under the Gloucestershire County Council created by the Local Government Act, 1929, and the employment under the London County Council created by contract.

The defendants rely on the literal construction of s. 124, sub-s. 1, of the Act of 1929. (1) Leaving out words which do not apply, that sub-section enacts that if an officer (which by s. 134 of the Act includes "servant") in the plaintiff's position, that is, who has made the contributions required by the Act of 1896, is by the Act of 1929 transferred to the service of any council (as the plaintiff was to the service of the Gloucestershire County Council on April 1, 1930), then if the council to whose service he is so transferred have no superannuation scheme (which is admitted to be the fact as to the Gloucestershire County Council) the Act of 1896 shall apply to him: "and shall continue so to apply to him so long as he is in the service of the council of any county . . . . until" under statutory provisions for the superannuation of persons employed by the councils of all counties and county boroughs, there becomes applicable to him a superannuation scheme not less favourable than that provided by para. (*a*) of sub-s. 2. No such statutory provisions have yet been enacted.

The defendants say that this can mean but one thing—namely, that the plaintiff having been transferred to the service of the Gloucestershire County Council, who have no superannuation scheme, the Act of 1896 applied to him while he was a servant of that council, and continues to apply to him so long as he is in the service of any county council, and therefore, so long as he is in the service of the London County Council.

(1) See note (1) ante, p. 85.

I think that s. 4 of the Act of 1896, to which I was referred, gives some support to the defendants' case. It shows that the service which qualifies for the benefit of the Act of 1896 may be discontinuous, and it follows that the word "continue" in s. 124, sub-s. 1, of the Act of 1929 (1) cannot be said to be inappropriate to a service interrupted by one or more intervals.

The plaintiff contends that in order to avoid the injustice of giving him benefits inferior to those enjoyed by men who are in precisely the same service as he, simply because he was formerly employed in a service in which he was entitled only to the benefits of the Act of 1896, the words "so long as he is in the service of the council of any county" must be read with some such implied addition as "in a capacity to which there is no superannuation scheme of that council applicable," or "to whose service he shall have been so transferred." He relies on the words "continue" and "so long" as supporting this contention. It appears to me impossible to accept this argument. There would have been no difficulty in framing appropriate words if either of these suggested additions had represented the intention of Parliament; and the use of the word "any" without qualification, seems to me quite inconsistent with either of them. It was also argued (as I understood) that sub-s. 4 of s. 124 applied to this case; but this can only be supported by reading "on" in the first line as meaning "on or at any time after." This seems to me impossible.

I took time to consider this case, because I was impressed by the forcible argument for the plaintiff that there was no intelligible reason for the enactment of s. 124, sub-s. 1, if read as having its apparent meaning as I have stated it, and that as so read it appeared to be unfair to a man in the plaintiff's position. This seems, so far as I can judge, to be quite true; and indeed counsel for the defendants could not, I think, really contest it. But further consideration has only confirmed me in the opinion that this sub-section can

(1) See note (1) ante, p. 85.

mean nothing else than what I have said ; and it is, therefore, of course, my duty so to construe it. There must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiff : *Pritchard, Englefield & Co., for William Booth, Manchester.*

Solicitor for defendants : *Solicitor to London County Council.*

W. L. L. B.

GLASSBROOK BROTHERS, LIMITED *v.* LEYSON.

C. A.
1932
Nov. 30 ;
Dec. 1, 2, 5, 6.

Mine—Coal Mine—Working Facilities—Application to Canal Commissioners to grant Lease—Alleged Unreasonable Refusal of Owner to grant Lease—Unreasonableness a Question of Law—Owner's Refusal to grant Lease not containing Covenant by Lessee to work Mines diligently—Reasonableness—Right of Appeal from Commissioners—Railway and Canal Traffic Act, 1888 (51 *&* 52 *Vict. c.* 25), *s.* 17—*Mines* (*Working Facilities and Support*) *Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 20), *ss.* 1, 3, 4, 6—*Mining Industry Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 28), *s.* 13.

By s. 1 of Mines (Working Facilities and Support) Act, 1923, power is given in certain cases to the Railway and Canal Commission to confer a right to work minerals in the manner and subject to the provisions thereinafter appearing. By s. 13 of the Mining Industry Act, 1926, the grounds on which such an order could be made were widened, and by sub-s. 1 any person desirous of searching for any coal may under the provisions of Part I. of the Act of 1923 apply for leave and the Commission may, subject to the provisions of the principal Act, grant the right if they consider that it is expedient in the national interest. Sect. 3 of the Act of 1923 gives power to grant ancillary rights for facilitating the working of minerals, and under s. 13 of the later Act an ancillary right may be granted to a person to whom a right of working coal is granted. Sect. 4 of the Act of 1923 provides that " neither the right to work minerals nor an ancillary right shall be granted . . . . unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement " for the reason (amongst others) " (*d*) that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable."

The applicants, who were colliery proprietors owning mines which adjoined those of the respondent, were desirous of acquiring rights to work the respondent's mines, which were then unworked. The applicants were willing to pay certain rents and royalties and a dead

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1932

Glassbrook Brothers, Ld. v. Leyson.

rent, but refused to give a covenant to work the mines diligently. The respondent declined to grant a mining lease not containing a covenant to work diligently. The applicants thereupon applied to the Railway and Canal Commissioners for the grant of a right to work the minerals in accordance with the provisions of the Act of 1923 and s. 13 of the Act of 1926 and for the grant of certain ancillary rights in accordance with s. 13 of the Act of 1926. In their application they alleged (inter alia) that the respondent, being the person with power to grant the right to work, had unreasonably refused to grant it and had demanded terms which having regard to the circumstances were unreasonable. The Commissioners found that the conduct of the respondent had been unreasonable and in substance made the order asked for.

On appeal:—

Held, that it was a condition precedent to the exercise by the Commissioners of their jurisdiction under the Acts that they should first find on the facts that the respondent was unreasonable in his refusal or unreasonable in his demands; that the question of unreasonableness was a question of law for the decision of the Commissioners; and that an appeal from their decision therefore lay to the Court of Appeal, notwithstanding s. 17 of the Railway and Canal Traffic Act, 1888, which provided that "no appeal shall lie from the Commissioners upon a question of fact."

Shotts Iron Co. v. *Fordyce* [1930] A. C. 503; *King* v. *Port of London Authority* [1920] A. C. 1; and *Great Western Ry. Co.* v. *McCarthy* (1887) 12 App. Cas. 218 applied.

Held, also, that the respondent was not unreasonable in requiring as a condition of granting a lease that the applicants should enter into a covenant to work the minerals diligently.

Jegon v. *Vivian* (1865) L. R. 1 C. P. 9, 34 and *Strelley* v. *Pearson* (1880) 15 Ch. D. 113, 119 followed.

Decision of Commissioners reversed.

Appeal from a decision of the Railway and Canal Commission.

The facts as stated in the application to the Commission were as follows:—

1. In pursuance of sub-ss. 1, 2, and 3 of s. 5 of the Mines (Working Facilities and Support) Act, 1923 (thereinafter referred to as "the principal Act"), as amended or extended by s. 13 of the Mining Industry Act, 1926, Glassbrook Brothers, Ld., colliery proprietors, applied for the grant of the right to work the minerals specified in the application in accordance with the provisions of s. 1 of the principal Act and s. 13 of the Mining Industry Act, 1926, and for the grant of the ancillary rights specified below in accordance

with the provisions of s. 13 of the Mining Industry Act, 1926.

2. The minerals which were the subject of this application (thereinafter called "the minerals") consisted of the 4 ft., 5 ft., 6 ft. and 3 ft. seams of coal and any intermediate seams, which were comprised in and lay under lands having an area of about 122½ acres, and known as Ystrad Isha or Ystrad Isaf Farm situate in the parish of Cockett in the county borough of Swansea.

The minerals were comprised in or lay under land which was of freehold tenure, and the surface thereof was now owned and occupied by one William Davis, of Ystrad Isha Farm aforesaid. Both the surface and the minerals were formerly the property of one Robert Thomas Leyson (thereinafter referred to as "the respondent"), who on the sale of the surface lands to the said William Davis, in or about the years 1917 or 1918 reserved and excepted the minerals out of the sale with full powers of working them.

3. The applicants had an interest in adjoining minerals, particulars of the leases of which were set out in the application.

4. The applicants alleged that the minerals were in danger of being left permanently unworked for the following reasons:

If not worked by the applicants in the normal course of working they would be surrounded by the applicants' takings on the south, north and east and by old workings on the west and would therefore be practically isolated.

5. They further alleged that having regard to the following facts: (1.) The depth of the seams—namely, (*a*) the 4 ft. seam of coal at 80 to 100 yards; (*b*) the 5 ft. seam of coal at about 200 yards; and (*c*) the 6 ft. seam of coal at about 340 yards. (2.) The greatly disturbed nature of the ground due to synclinal axis of a local character running east and west through the said property. (3.) The presence of a downthrow fault south of about 120 yards which ran through the whole of the said property, this area of coal could not be efficiently or economically worked by itself.

In addition the area of coal to be won would not justify the sinking of two shafts which would be necessary to work the same at an estimated cost of at least 60,000*l.*, and in addition there would be additional expenditure owing to the costs of constructing a mineral railway for the conveyance of the said minerals when gotten to the nearest railway so as to render same merchantable and capable of delivery to the ultimate consumers.

6. The ancillary rights for which the applicants applied were as follows:—

(*a*) A right to let down the surface of the said lands on condition that the applicants entered upon the surface thereof and repaired all actual damage caused by their workings to the surface of the said lands and to existing or future buildings thereon and paid reasonable compensation for the same, excepting always all such damage as might be caused to lands or buildings for which the applicants were not now liable.

(*b*) A free right of underground wayleave or other right for the purpose of access to or conveyance of minerals from the mines and adjoining mines of the applicants worked in conjunction therewith whether separately owned by them or not. The exact position and direction of such roads or levels as might be requisite could not at present be definitely stated.

(*c*) A right to obtain a supply of water or other substances in connection with the working of the said minerals.

(*d*) A right to dispose of water or other liquid matter obtained from the mines or any by-product works.

(*e*) A free right of underground airway for the ventilation of the said mines and adjoining mines of the applicants.

(*f*) The right to carry out such underground works as might be necessary in accordance with the usual mining practice in the district.

7. The applicants alleged that the proper and efficient working of the mines would be unduly hampered by the absence of the ancillary rights applied for as follows:—

The 4 ft. seam was situate at a distance of about 80 to 100 yards below the surface, and consequently there would be every probability of subsidence.

The underground wayleave was necessary to enable the applicants to work efficiently and economically the coal comprised in the said lease to the applicants from the Duke of Beaufort. These rights were necessarily ancillary to the working of the coal, and the appellants asked that they might be granted free wayleave for home and foreign coal. The rights to obtain a supply of water and to dispose of water and other liquid matter were necessary, as the applicants apprehended that by reason of the synclinal axis already referred to water from old and abandoned colliery workings situate on the southern side of the said property would be met with when the workings were extended to the said axis, and also so as to enable them to work the said mines efficiently and economically, and with due and proper care for their safety and that of the workmen employed therein.

8. The applicants alleged that it was not reasonably practicable to obtain the right to work the minerals or the ancillary rights applied for by private arrangement for one or more of the following reasons :—

That the person or persons with power to grant the right unreasonably refused to grant it or demanded terms which having regard to the circumstances were unreasonable.

The owner of the minerals was the respondent.

For many years past the applicants had been in unsuccessful negotiation with the respondent with reference to the working of the minerals or some of them. Considerable correspondence had passed between the parties and their solicitors in relation thereto, and in particular the applicants would rely upon correspondence commencing on February 21, 1924, and continuing from time to time until the date of the issue of the present application.

9. By letter dated December 19, 1931, addressed by the solicitor to the applicants to the respondent, the applicants offered to work the minerals by way of lease upon the following terms and conditions :—

Term.—30 years from date of lease.

Seams.—3 ft., 4 ft., 5 ft. and 6 ft. seams, and any intermediate seams and fireclay underlying Ystrad Isha Farm.

Dead Rent.—150*l.* per annum.

Royalty.—6*d.* per ton for large and small (2240 lb. to the ton).

Wayleave.—1*d.* per ton on all foreign coal.

Engine Coal.—6 per cent. and including any impurities.

Average Clause.—Five years; short workings of any half-year to be recoverable out of the surplus workings over the next succeeding nine half-years.

The respondent refused to accept the said offer.

10. The applicants stated that they were prepared to give an undertaking to proceed to win the minerals within a month from the date of the granting of the rights asked for by the application if the same were granted by the Court. The applicants further asked that they might be granted free wayleave for foreign coal, as well as the coal the subject of this application, owing to the costs and expenses they had incurred in applying for the same.

11. The applicants alleged that it was in the national interest that the rights applied for should be granted to the applicants, as if not granted at the present time they would be unable in the course of time to work properly or economically a taking of about 300 acres situate south of the said Ystrad Isha Farm, and held by them under a lease from the Duke of Beaufort, and further alleged that the probabilities were that in consequence thereof the southerly and easterly workings of the applicants' Number 1 Garngoch Colliery would also have to be abandoned, which would inevitably result in heavy unemployment. The applicants had now almost completely worked out so much of the 6 ft. seam as was vested in them under their leasehold areas situated on the southern side of this particular colliery, with the exception of so much of the said seam as was comprised in the said lease from the Duke of Beaufort. The coal in the last mentioned seam was of a bituminous character, and in much demand for local industries and in particular those of the steel and tinplate trades.

12. The applicants stated that they were in the course of modernizing their Garngoch Collieries and were installing

electrical and up-to-date plant and had the means and opportunity to work and develop the minerals efficiently and economically. They further stated that they were also the owners of a mineral railway connecting their collieries with the Great Western Railway and London, Midland and Scottish Railway at Gowerton, which passed almost alongside the boundaries of the said Ystrad Isha Farm.

The workings of the applicants' Number 1 Garngoch Colliery now extended to a distance of about 60 yards from the boundary of Ystrad Isha Farm, and the applicants alleged that they would be in a position (subject to some preparatory operations in clearing the said workings and with due regard to the mining conditions) to win and work the 5 ft. and 6 ft. seams under the said farm within a reasonable period from being granted the necessary rights.

13. Subject to para. 15 of the application the applicants asked that they might be granted the right of working the said minerals and the ancillary rights asked for by them upon the terms and conditions set out in para. 9 of the application and for the term of thirty years from the order made on the application; save only that they repeated para. 10 and asked that they might be granted free wayleave for all coal carried by them from the mines and adjoining mines of the applicants.

14. The applicants stated that the rights applied for would not affect any local authority.

15. They further stated that if the rights applied for by them were granted they would be prepared to pay such a sum by way of royalty and to make such other payment by way of compensation for damage as the Court might determine and to such persons as the Court might direct. Further, and in the alternative, they would also be prepared to repair all damage caused to the buildings situate on the said lands by working of the said minerals, or to the grant of such ancillary rights as aforesaid, excepting always such damage as might be caused to buildings in respect of which the applicants were not now liable.

The respondent, in course of his answer, denied that he had ever been asked by the applicants to grant the ancillary rights claimed by them or any of them, and for that reason, if for no other, he had never refused to grant them or any of them. He further denied that he had unreasonably refused to the applicants a lease of the said minerals or demanded terms which having regard to the circumstance were unreasonable, as was alleged in para. 8 of the application. He alleged that the correspondence from 1913 onwards would show clearly that the reasons for his refusal to grant a lease were (inter alia) that upon every such occasion negotiations had broken down, because the applicants refused to give any undertaking to work the said minerals diligently or at all, or in any other way to secure the respondent from the locking up of his minerals; and that, whilst refusing this demand of the respondent, they had entered into and taken other leases containing covenants on their part to work the coal so leased.

The Commission found that the respondent had been unreasonable, and in substance granted the application.

The respondent appealed. The appeal was heard on November 30; December 1, 2, 5 and 6, 1932.

Upjohn K.C. and *W. Blake Odgers* for the appellant. The order giving the respondents power to work the coal in question, which the Railway and Canal Commission purported to make under the Mines (Working Facilities and Support) Act, 1923, as amended by s. 13 of the Mining Industry Act, 1926, was made without jurisdiction and in defiance of those statutory provisions. Sect. 1 of the Act of 1923 gives power in certain cases to confer a right to work minerals in the manner and subject to the provisions thereinafter appearing. Sect. 13 of the Act of 1926 widened the grounds on which such an order could be made, and by sub-s. 1 any person desirous of searching for or working any coal may, under Part I. of the Act of 1923, apply for leave, and the Commission "may, subject to the provisions of the principal Act, grant the right if they consider that it is expedient in the national interest. . . . ." Sect. 3

of the Act of 1923 gives power to grant ancillary rights for facilitating the working of minerals, and under s. 13, sub-s. 3, of the later Act an ancillary right may be granted to a person to whom a right of working coal is granted. Sect. 4 of the Act of 1923 provides that "neither the right to work minerals nor an ancillary right shall be granted . . . . unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement" for the reason (amongst others) "(*d*) that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable." Then s. 6 gives the Commission power to grant a right "on such terms and subject to such conditions, and for such period, as the Commission may think fit," if satisfied that the requirements of that Part of the Act are complied with in the case of the applicant, and that it is expedient in the national interest. So, too, s. 8, sub-ss. 4 and 7, recognize the principle that the Commissioners must grant rights only if satisfied that it is in the national interest.

The grounds on which it is contended here that the Commission granted the order appealed against without jurisdiction are:—

(1.) That the order was not made in the national interest.

(2.) That the applicants are not desirous of working the seams in question, but merely seek to get access to other minerals through the seams in question.

(3.) That the appellant's refusal to grant a lease on the terms asked for by the applicants was not unreasonable.

(4.) That there is no power to insert clauses in the order (*a*) giving either party liberty to apply to renew, vary or rescind the order; or (*b*) providing that any dispute is to be referred to the Railway and Canal Commission so as to deprive the appellant of his remedy of going to the Courts.

(5.) That a less sum was awarded to the appellant in compensation than the applicants had offered to concede to him.

Under s. 13 of the Act of 1926 an applicant must be a person desirous of working the mining area to which his application relates, and the Commission may grant the right to work only if it is expedient in the national interest. Here neither of these elements existed. There is no ground for holding that the grant was in the national interest, and no justification for the order made which imposes no obligation on the respondents to work the minerals. The chief object of the application was not to work the minerals, but to obtain a right of access through the appellant's property to the Duke of Beaufort's adjoining mining area. The respondents want merely to drive a road through the appellant's coal for this purpose, that is, to obtain a merely ancillary right to enable the respondents to work other land. But an ancillary right can only be granted in connection with the working of the area in regard to which it is granted. On both these grounds, therefore, the grant is not within s. 13 of the Act of 1926. Further, the appellant's refusal to grant a lease on the terms asked for was not unreasonable. That is shown by the terms imposed by the Commissioners, and the result is that the Commissioners had no power to make the grant.

The appellant relies on the correspondence as showing that the respondents were never desirous of working the minerals.

An undertaking to "win" minerals is not the same thing as an undertaking to "work" them. "A covenant to 'win' a mineral means *prima facie*, to reach it, and put it in such a position that it may be continuously worked in the ordinary way": MacSwinney on Mines, 5th ed., p. 138.

The appellant has never refused to grant a right to work the minerals, but the respondents are not persons who are desirous of working within the meaning of s. 13.

It is contended by the respondents that there is no appeal in this case, because the question is one of fact on which the decision of the Commissioners is final. It is submitted, however, that that is not so. The Commission is a tribunal with limited jurisdiction only in certain cases. It was laid down by Coleridge J. in delivering the judgment of Ex. Ch. in *Bunbury* v. *Fuller* (1) that "it is a general rule, that no

(1) (1853) 9 Ex. 111, 140.

court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends." That rule has been followed in many cases: see *Pease* v. *Chaytor* (1); *Rex* v. *Bradford.* (2) The Commissioners here could therefore not give themselves jurisdiction by wrongly deciding that the appellant was unreasonable. There is therefore no difficulty in bringing the matter before this Court.

It is submitted therefore that the order of the Commissioners is absolutely outside the Act.

The provisions of the Acts require that the applicants should state that they will work the coal. The respondents have no power to expropriate the appellant's property unless s. 4 of the Act of 1923 is complied with.

Manning K.C. and *Gordon Bamber* for the respondents. Unless the respondents can maintain the order of the Commissioners the consequences will be very serious to them, as their mine will have to be closed down and numbers of men will thereby be thrown out of work.

The correspondence shows that the respondents were desirous of working the minerals.

The Commissioners here accepted Mr. Treharne Rees' evidence as to the proper royalty to be given under the order. There was evidence as to the concessions and reduction of rents granted to adjoining owners.

[ROMER L.J. There the reduction is only till better times came.]

There was evidence too that the provisions for payment of wayleaves had disappeared in modern leases.

Turning to the relevant Acts of Parliament, s. 13, sub-s. 1, of the Act of 1926 shows that application may be made to search for minerals without including an application to work them. Further, sub-s. 2 is of great importance in showing that when under a mining lease there "are restrictions or conditions impeding the working" of the coal in the most efficient and economical manner, the Commission

(1) (1863) 3 B. & S. 620, 636, 639.

(2) [1908] 1 K. B. 365, 371.

can confer a right to work freed from those restrictions or conditions.

[LORD HANWORTH M.R. That deals with a later position. The respondents have to show that s. 4 of the 1923 Act has been complied with. If not, there was no jurisdiction to make the order in this case.]

Compliance with the requirements of s. 4, sub-s. 1, has to be shown to the satisfaction of the Commission. Here it has been shown to their satisfaction that "it is not reasonably practicable to obtain the right in question by private arrangement" because "the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable." There is no appeal from the Commission's decision. The decision of the tribunal on questions of fact is made conclusive by s. 17 of the Railway and Canal Traffic Act, 1888, which by s. 10 of the Act of 1923 is made applicable "to the determination of questions relating to applications" under that Act.

[LORD HANWORTH M.R. The question under s. 4 being preliminary to the exercise of the jurisdiction is, even if a question of fact, open to inquiry in this Court: *Bunbury* v. *Fuller*. (1)]

It is contended that the effect of s. 17 of the Act of 1888 cannot be cut down by this consideration.

[SLESSER L.J. *Bunbury* v. *Fuller* (1) was followed by *Rex* v. *Bradford*. (2) Further it has been held again and again that after the facts have been ascertained the question of reasonableness is a matter of law, as for example in *King* v. *Port of London Authority*. (3)]

Here there is a duty cast on the Commission to decide the question of reasonableness by the words "unless it is shown" in s. 4, sub-s. 1. Further the principle of *Bunbury* v. *Fuller* (1) only applies when the decision giving a tribunal jurisdiction is "on a point collateral to the merits of the case." That is not so here. In *Pease* v. *Chaytor* (4) there was an express statutory provision preventing the magistrates from deciding as to the validity of the rate. Here the preliminary question under s. 4 is referred to the same tribunal as makes the order asked for and it is not a decision as to a collateral matter: compare *Rex* v. *Lincolnshire Justices* (1) and *In re Tilmanstone (Kent) Collieries, Ld.* (2) It is to be remembered that the question of reasonableness under s. 4, sub-s. 1, can only be decided after all the evidence has been heard.

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(1) 9 Ex. 111, 140.
(2) [1908] 1 K. B. 365.
(3) [1920] A. C. 1.
(4) 3 B. & S. 620.

[SLESSER L.J. Have you found any case where the question of reasonableness has been held to be a question of fact ?]

The question of reasonableness is always left to a jury to decide.

Upjohn K.C. in reply.

[LORD HANWORTH M.R. We want to hear you on the point whether the question of reasonableness is a question of fact or of mixed fact and law.]

Apart from that, the various questions that arise under s. 4 of the Act of 1923 are each of them in regard to a collateral matter. It is the same in (*a*), (*b*), (*c*) and (*d*) of s. 4, sub-s. 1. Under none of these heads does a point arise on the merits of the application but only something preliminary and apart from them that has to be decided to found the Commission's jurisdiction. The course of negotiations between the parties before the proceedings were commenced must be a collateral matter: compare *Rex* v. *Lincolnshire Justices.* (3) The question of unreasonableness does not affect the merits: *Rex* v. *Bradford.* (4) That case applies directly here, and the fact that the tribunal has to decide a preliminary question under s. 4 makes s. 17 of the Railway and Canal Traffic Act, 1888, inapplicable.

[He was stopped.]

LORD HANWORTH M.R. This appeal must be allowed. It is, I think, the first time that a question arising under s. 4 of the Act of 1923 has come before this Court, and I

(1) [1926] 2 K. B. 192.
(2) [1928] 1 K. B. 599.
(3) [1926] 2 K. B. 192, 202.
(4) [1908] 1 K. B. 365, 371.

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therefore think it right, before coming to the facts in this case, to say a few words about the Act of 1923 as amended by the Act of 1926.

First of all, it must be observed that these Acts are passed for the purpose of overriding in the national interest some private rights which exist. The title of the Act of 1923 is: "Mines (Working Facilities and Support) Act." It is important to remember that if private rights are invaded, the Act which gives the right so to do must be conformed to.

The structure of the 1923 Act is this. Sect. 1 opens with giving a power to grant a right to work minerals which would otherwise be left unworked and remain permanently unworked by reason of the difficulties which arise, or would arise, from the complexity of ownership, or that they lie in such small parcels that they cannot be worked separately.

By s. 3 there is a power to grant ancillary rights which may be useful, ancillary to the working of the mine, and make that working more efficient. It may be observed that by the decision which was reached in *In re Tilmanstone (Kent) Collieries, Ld.* (1), in the Court of Appeal there is to be a generous interpretation of the right to work and also of the ancillary rights. Those ancillary rights are clearly intended to embrace a number of rights, because by sub-s. 2 of s. 3 they are particularly set out so as to enlarge the generality of the foregoing provision.

To those powers under s. 1, the Mining Industry Act, 1926, by s. 13, has given a still further enlargement, and now by sub-s. 1: "Any person who is desirous of searching for or working, either by himself or through a lessee, any coal may . . . . make an application to search for or work the coal," and the Railway and Canal Commission "may, subject to the provisions of the principal Act, grant the right if they consider that it is expedient in the national interest that the right should be granted to the applicant." So that in addition to the more limited sphere of s. 1, the wider area covered by s. 13 is added. But s. 4 of the Act of 1923 imposes a certain limitation, as the side-note says, on the power of granting the rights. It is, I think, important to look at s. 5 to see how an application for the rights, be they a right to work or an ancillary right, is to be brought before the Court. The application is to be made to the Board of Trade, and then the Board of Trade, unless they think that a prima facie case is not made out, are to send it on to the Railway and Canal Commission. I think Mr. Bamber's analogy that the action of the Board of Trade is comparable to that of a grand jury is a happy one. If a prima facie case is made out, then the matter goes as of course to the Railway and Canal Commission. By s. 6 it is provided that: "Where a matter is so referred to the Commission, the Commission, if satisfied that the requirements of this Part of this Act are complied with in the case of the applicant, and that it is expedient in the national interest that the right applied for should be granted to him, may, by order, grant the right on such terms and subject to such conditions, and for such period, as the Commission may think fit." It will be observed that under s. 6, sub-s. 1, before ever the Commission starts to consider the expediency of granting the right or the terms they have first to be satisfied "that the requirements of this Part of this Act are complied with."

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(1) [1928] 1 K. B. 599.

Now what are "the requirements of this Part of this Act"? It seems to me that one must turn back to look at s. 4, because there is a negation of the power of granting this right to work, or the ancillary right, "unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement." To my mind, when one looks at sub-s. 1 of s. 6, and turns back to s. 4, sub-s. 1, it appears that before ever the Commissioners take the matter into their consideration they have to be satisfied that s. 4 has been complied with. This seems good sense in such a procedure, for the Court ought not to be invoked for its assistance unless all the powers of private arrangement between the parties have been exhausted; and when one looks at the catalogue of reasons given in sub-s. 1 from (*a*) to (*d*), one sees that it connotes serious difficulties in respect of which it may be reasonable to invoke the assistance of the Court: "(*a*) that the persons with power to grant the right are numerous or have conflicting interests"—it may be difficult to find them or to adjust the conflicting interests; "(*b*) that the persons with power to grant the right, or any of them, cannot be ascertained or cannot be found"—again, a very great difficulty may arise by reason of some of those who have some interest or power being overseas, and the like. And so one comes to (*d*): "that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable." Unless it is determined that unreasonableness is established, it appears to me that the Commission cannot proceed to exercise the jurisdiction given them, because the preliminary indicated by sub-s. 1 of s. 6, the preliminary on which the Commission have to be satisfied, would otherwise not be fulfilled.

Now it is said in this case that such a matter cannot be brought before the Court of Appeal, and that by reason of the terms of s. 17 of the Railway and Canal Traffic Act, 1888, which established the Railway and Canal Commission. Sect. 17 provides: "(1.) No appeal shall lie from the Commissioners upon a question of fact, or upon any question regarding the locus standi of a complainant. (2.) Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal," in other words, there is to be an appeal on questions of law, but not on questions of fact which lie within the sphere and competence of the tribunal. It is to be noted that by sub-s. 6 of the same section the power to review "an order or proceeding of the Commissioners" is not to be questioned or reviewed or "restrained or removed by prohibition, injunction, certiorari, or otherwise, either at the instance of the Crown or otherwise." Therefore the sole right that is left is to question the exercise of the jurisdiction of the Commissioners on matters of law; and it is said that this point that arises under s. 4 is just one of those matters which may be, and is, excluded by virtue of the terms of s. 17 of the Act of 1888.

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There is a difficulty in giving this effect to s. 17, to my mind, for I think that one has to look back at what is the jurisdiction which is entrusted to the Commissioners under the Act of 1888; and more than that, one has to remember that the Acts of 1923 and 1926 superimpose upon the structure made in 1888 certain further powers. But although it may not be necessary for the purpose of my judgment—for there are other points on which I think the appeal succeeds—I should like to express my opinion in response to the argument which has been presented by Mr. Upjohn that the questions which arise under s. 4 are preliminary to the jurisdiction to be exercised by the Commission, and that appeal on questions of fact relating to that preliminary question is not excluded by s. 17. To my mind the principle laid down in *Bunbury* v. *Fuller* (1), and affirmed again in *Pease* v. *Chaytor* (2), applies. That rule is a well established rule and is perhaps most shortly referred to in *Rex* v. *Bradford* (3), where Channell J. says: "It is clear upon the authorities that such a tribunal cannot give itself jurisdiction by wrongly deciding a question of fact which arises as a preliminary question before it begins to exercise its jurisdiction." As he points out there, a difficulty constantly arises as to what is a preliminary question, whether the question before the inferior Court is a preliminary one or whether it is exercising the jurisdiction given to it by the statute. For my part, I cannot find a better differentiation on that point than that which is provided by the judgment of Atkin L.J., as he then was, in *Rex* v. *Lincolnshire Justices* (4): "Where the inferior Court has given a decision upon one of the points involved in the actual matter committed to its decision, it cannot be said that its decision upon that point is without jurisdiction"; and then: "If the fact in question be not collateral, but a part of the very issue which the lower Court has to inquire into, certiorari will not be granted," and so on.

Applying that test, I should ask myself the question, are the matters which have been decided under s. 4 matters

(1) 9 Ex. 111, 140.
(2) 3 B. & S. 620, 640, 653.
(3) [1908] 1 K. B. 365, 371.
(4) [1926] 2 K. B. 192, 202.

which are "part of the very issue which the lower Court has to inquire into," and when I put that question I find that to my mind the answer is that s. 4 deals with matters which are collateral to, preliminary to, the question of whether or not there should be a right of working, or an ancillary right, given, which must be determined before the question of whether those rights should be given, or the terms upon which they should be given, or the time at which they should be given. It must be found as a wholly different matter whether or not the person against whom the order is asked for has acted unreasonably. A good illustration and a close one to the present case is to be found in *Liverpool Gas Co.* v. *Everton* (1), in which the same point was considered.

But, as I have said, although I have made those observations and expressed my own view, I doubt whether it is essential to come to a final determination upon that point, for upon another point I am quite satisfied that the appeal ought to be allowed. Let me accept the view that all these matters are for the Court of the Railway and Canal Commission. But we have then to determine whether or not upon the facts found before us the respondent was unreasonable, unreasonable in his refusal or unreasonable in his demands. That is to my mind a question of law. It has been so determined in a number of cases on which this point has been brought before the Courts. As an illustration I may take the question of what is a reasonable cause under the Workmen's Compensation Act, and in the last case, which is *Shotts Iron Co.* v. *Fordyce* (2), the present Lord Chancellor says: "As Lord Parmoor said in *King* v. *Port of London Authority* (3): 'No doubt the relevant facts should be found by the learned judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute,'" and Lord Dunedin says the same (4): "The facts from which the inference is to be drawn one way or the other must be found as facts by the arbitrator, but the inference that he draws from them is not an inference in fact, but is an inference in law." Lord Buckmaster is still more explicit. He says (1): "Nor can I accept the view that the question lies in the twilight of debatable ground between law and fact. It is a question for the opinion of the tribunal in each case whether the facts proved constitute a reasonable cause within the meaning of the statute," and Lord Macmillan expresses himself in the same way. (2) Another illustration may be found in the law relating to reasonable cause in the matter of malicious prosecution, and Lord Davey says in *Cox* v. *English, Scottish, and Australian Bank* (3): "Now the proceedings at the trial in this case were not conducted with extreme strictness, because the question whether there was reasonable and probable cause was left to the jury, whereas the judge ought to have determined that for himself upon the facts found by the jury." Therefore, it appears that this question whether or not there was an unreasonable refusal or an unreasonable demand is a question for the decision of the Court as a question of law, and subsidiary to that there is, of course, the question which is without doubt a question of law—namely, whether there was any evidence at all of the respondent unreasonably refusing or making an unreasonable demand.

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(1) (1871) L. R. 6 C. P. 414.

(2) [1930] A. C. 503, 508.

(3) [1920] A. C. 1, 31.

(4) [1930] A. C. 503, 510.

I come, therefore, to consider what has been determined by the Commission upon that point. Sir Francis Taylor was the member of the Commission who put his finger upon the point, and he said this in reference to s. 4: "Sect. 4 has, in the opinion of all of us, been satisfied in this sense, that Mr. Leyson was unreasonable in refusing to grant the right because he has all through insisted upon a dead rent of 275*l.*, a royalty of 7*d.* and 1*d.* wayleave, none of which this Court has thought right to grant." Is that a test? Is that a right test of what is reasonable? In fact the Court did grant something more than that which was offered by the applicants, not precisely in the same form, but something more was granted at the instance of the Court. Can it therefore be said that the respondent was unreasonable in

(1) [1930] A. C. 512. (2) Ibid. 514.
(3) [1905] A. C. 168, 171.

refusing terms which the Commission itself had expanded into what they think ought to be the proper conditions? To say or to hold that, unless the respondent obtains all that he asks for, he was unreasonable seems to me to impose an incorrect standard of what is reasonable and what is unreasonable.

Let it be quite plainly understood that in discussing this question I have no desire in any way to invade the territory which rightly belongs to the Commission itself, such questions as whether or not royalties may be imposed at a certain amount or for a certain time based on the fact that there has been remission of royalties by some coalowners in the neighbourhood, or that a wayleave should be imposed or charged or not, or that the average clause should be for a certain time, longer or shorter. All those are matters which, to my mind, fall, and rightly fall, within the jurisdiction of the Commissioners. But we have to consider whether or not on the facts found there was any evidence of unreasonableness, or upon the facts found that a proper test of reasonableness has been applied.

For the moment, therefore, I turn to the facts as they stand. Here I say quite definitely that I think it is wrong to go back over some old negotiations or, it may be, some old controversies which have taken place between parties years previously. When the matter is brought before the Commission the Commissioners must consider what is the situation at the time when the application is made to them, and it is wrong to paint a man with a particular colour and to say that at all times whenever he turns up before the Commission he must be treated in the character which was attributed to him in some past dealings.

I turn, therefore, to consider this matter in respect of the offer which was made in the letter of December 19, 1931. I need not read the terms, except this, that the dead rent offered was 150*l.* per annum, a wayleave of 1*d.* per ton on all foreign coal; and the letter concludes: "I think you will also find that even if it were possible or profitable for any one else other than my clients even under normal conditions to

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work your minerals, by reason of the said scheme for selling and marketing coal, and the prevailing conditions generally in the coal mining industry, it will, to say the least, be difficult for you to get any one else interested in these minerals." That paragraph is one which I should regret was put in, because it does not seem a tactful invitation for acceptance by the respondent. The reply on December 21 is this: "I note your view that nobody else is likely to be interested in these minerals except your clients and am obliged for your letter . . . . in which you inform me," and so on and so on, "but not to undertake to work them diligently or at all." On December 21 the reply by Mr. Harris is: "The question of whether they would work them diligently or not would depend entirely upon trade conditions, but I propose taking their instructions as to this." On December 22 Mr. Leyson writes back: "When years ago your clients' predecessors, Messrs. Glassbrook, took the coal at a small dead rent they locked it up and stated in so many words they were not going to work beyond the dead rent and would give it up unless sold to them at their price which was refused. All this was fully explained when you proposed to take me before the Commissioners, an invitation which I accepted but your clients thought better of"; he is insisting upon the covenant to work and perhaps also throwing out an answer to the fact that the applicants have said: "Well, you will never get any better terms than we offer you, because no one else could work your coal." The reply to that letter by Mr. Harris is this: "I have no doubt that if and when my clients do decide to work the minerals they would do so with all reasonable diligence and in the most approved and economical manner possible. My clients are not concerned as to what their predecessors may have done, and in any event a repetition of the attitude which it is alleged was adopted by them would not be an economical proposition to-day or a luxury which my clients could afford." Then on January 13, 1932, Mr. Harris, who had then communicated with his clients, writes: "They cannot guarantee and therefore enter into a covenant for diligent working, but are prepared to enter into a covenant to work the minerals in the most approved manner in the district, and with due regard to the state and condition of the minerals and the trade conditions." Finally, on January 18, 1932, Mr. Leyson writes back: "I suggest you should put that correspondence before Mr. Williams, who was not then manager, so that he may understand why I have arrived at the determination that this coal will not be let except on the condition that it is worked diligently and constantly or given up." That is the controversy.

The application was made in April based upon the terms of the letter of December 19, 1931. Be it observed that no effort was made on the part of the applicants to see whether or not, by putting a covenant to work in terms and with certain exceptions, it would be possible to meet what the respondent obviously demanded. There was no further effort, and the point on which they had parted was that the respondent attached great importance and vital importance to the covenant to work.

Now was he unreasonable in that? Is that something which in law amounts to unreasonableness? On the other terms of the letter of December 19 it is plain that the judgment of MacKinnon J. shows that the respondent was entitled to have some guarantee given to him that the minerals would be worked. To that extent the Court was with him, because in his judgment MacKinnon J. says: "You do not want a dead rent in addition to a covenant to work." His words are these. He thinks that the right course is to put in a provision for a dead rent: "We have considered the amount of that," and so on; and further on he says this: "We think there should not be in addition to the provision for dead rent any clause binding the applicants to work." He had said earlier in his judgment: "In my view it is both illogical and unnecessary to insert in an order for a lease of this sort both those forms of provision by which the obligation to work the coal is imposed on the applicants; either you put in a covenant imposing an obligation on them to work, or, alternatively, you put in a covenant imposing on them the obligation to pay the dead rent; the one is alternative to the other," and so it is that he puts in a dead rent and says that it is unnecessary to put in a clause binding the applicants to work. That is a determination by the learned judge that it was right to insist upon some method of ensuring that the coal would be worked, and for that purpose they do not accept the offer of 150*l.* in respect of dead rent, but put it up to 240*l.* I am not overlooking the fact that they do not charge any wayleave; but at the same time, in terms, the learned judge declares that on this question of securing that the work shall be done the Commission have imposed a condition of sufficient obligation which will remove the dangers which the respondent foresaw. Having regard to that, is it possible to say that the insistence upon a covenant to work was something in respect of which the respondent had demanded terms which are unreasonable?

It is plain from the evidence that was adduced that there was some ground for anxiety on the part of the respondent. Mr. Grenfell, a witness for the applicants, said this: "(Q.) Now you have heard it suggested here to-day that this area could be worked alone—in fact, it is being suggested that genuine leases have been entered into or arrangements made, since this application was filed with regard to working this coal. What have you to say about that? (A.) At the present price of coal it is entirely out of the question. (Q.) Why is that? (A.) Because coal has to be sold to-day at the bare cost of production and no one will find capital to sink a shaft in this small area," and he says that some of the collieries have been shut down. There is evidence given by Mr. Daniel Williams: "(MacKinnon J.:) I rather gather that one of your chief objects in making the present application is really as much as anything else to get access to that?"—that is, to the coal lying under the Duke of Beaufort's land—"(A.) That is so, my Lord, and also to protect our own property"—not to work, but to protect and in order to get to the Duke of Beaufort's coal. Then Mr. Robert Treharne Rees gives this evidence:

"(Q.) And as they have to pay a very heavy dead rent to the Duke of Beaufort, if the wayleave was removed from this lease, there would be two urges, to use your phrase, to work the Duke of Beaufort's coal and to leave Mr. Leyson's coal alone? (A.) Quite so." Previously Mr. Treharne Rees was asked: "(Q.) Mr. Leyson consulted you in this matter because he was apprehensive that the applicants did not intend really to work his coal? (A.) That is so. (Q.) That was the point in his mind," and so on. Upon that the Commission itself yields so far as to impose a condition which will remove the anxiety felt by Mr. Leyson. In those circumstances it appears to me that it is impossible to hold as a matter of law on the facts found that there was an unreasonable demand on the part of Mr. Leyson.

After consideration of those letters and that evidence I come back to the question whether or not there is any foundation on which to hold in law upon these facts that s. 4 was satisfied, and I have come to the conclusion that it was impossible so to hold; and I repeat that I cannot accept the test which is suggested, that what is not granted by the Commission affords a test or touchstone by which the reasonableness of the respondent can be judged.

On these grounds I have come to the conclusion on the question of what is reasonable, and whether there was any evidence which justified the finding of the Court—that there was no right to hold that the respondent (the present appellant) was unreasonable or that s. 4 was complied with, and that there is no evidence on which it could be held that he acted unreasonably; and in those circumstances the prohibition, for such it amounts to, of further proceeding with the application, contained in s. 4, operated to defeat the success of the present respondents' application.

For these reasons the appeal must be allowed, with costs here and below.

SLESSER L.J. I am of the same opinion. I propose at the outset to say a few words about the purpose of the two Acts which we have here primarily to consider, the Mines (Working Facilities and Support) Act, 1923, as amended by the Mining Industry Act, 1926. Those Acts have for their objects, amongst other matters, to make provisions for facilitating the working of minerals in the national interest, and as part of the machinery for achieving those objects they have provided for certain lawful invasions of rights possessed by private individuals. It is elementary that where a statute authorizes an invasion of a proprietary right it has to be construed with care and strictness. As Bowen L.J. said in *In re Cuno* (1): "In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature." Now, in my opinion, the Legislature was mindful of that salutary provision in passing the Act of 1923, and in terms, in s. 4 of that Act, placed a limitation on the power of the Commission to grant rights either to work minerals on property which belonged to some one who had not hitherto worked the minerals or where other conditions required by the Act were satisfied, and in the case of granting ancillary rights; for s. 4, sub-s. 1, begins in unambiguous language in this way: "Neither the right to work minerals nor an ancillary right shall be granted under this Act unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement for any of the following reasons." Then follow a number of reasons with which we are not here immediately concerned. But, finally, para. (*d*) is: "that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable." Although the application I think here strictly considered is made under s. 13 of the Act of 1926 rather than under s. 1 of the Act of 1923, the two Acts are to be read as one, and those essential conditions which I have read out from s. 4 of the Act of 1923 have in any event to be satisfied.

(1) (1889) 43 Ch. D. 12, 17.

The question which arises in the present case is whether the applicants here are entitled to say in all the circumstances of this case that they can show it is not reasonably practicable to obtain the right in question by private arrangement because the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable. If they are unable to satisfy those requirements it follows, in my opinion, that there is no power to grant them rights under the Acts of 1923 or 1926.

But first it is said in the present case that matter has been decided as a matter of fact in favour of the respondents here by the Railway and Canal Commissioners, a Court of record presided over by a judge of the High Court, and that having regard to the fact that the right to this appeal is statutory, when we come to consider the statute which gives the right of appeal we have no jurisdiction to deal with their decision.

The matter arises thus. In s. 10, sub-s. 1, of the Act of 1923 it is provided: "The provisions of the Railway and Canal Traffic Act, 1888, as amended by any subsequent enactment, relating to the procedure for the determination of questions under that Act (including the provisions relating to appeals) shall apply to the determination of questions relating to applications under this Act as if they were herein re-enacted," with certain modifications which do not here concern us. That brings in the Railway and Canal Traffic Act of 1888, and particularly s. 17, which deals with appeals, sub-s. 1 of which says that no right of appeal shall lie from the Commissioners upon a question of fact, and if the respondents are right in saying that this is solely a question of fact I think they are equally right in saying that this Court has no jurisdiction to deal with the matter. But apart from s. 17, sub-s. 2 goes on to say: "Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal." Then sub-s. 4 says: "On the hearing of an appeal the court of appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law, and shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a superior court."

Therefore, the first question to consider is whether the defence which was urged before the Commissioners that the respondent there, Mr. Leyson, had not unreasonably refused to grant a right and had not demanded terms which, having regard to the circumstances, were unreasonable, was or was not solely a question of fact. In my opinion it is impossible, having regard to the language of para. (*d*), both limbs of which concern the question whether what has been done has been done unreasonably—whether the right has been unreasonably refused or the terms demanded were unreasonable—to say that that is not a question of law.

This question has been raised under the Workmen's Compensation Acts in regard to the question whether, a notice being required in those Acts on the occasion of an accident, there may be cases where there is reasonable cause excusing the absence of such a notice. I need only on that point cite one passage (which has been approved in *Shotts Iron Co.* v. *Fordyce* (1)), from the speech of Lord Parmoor in *King* v. *Port of London Authority*. (2) Lord Parmoor there says (3), speaking of the question whether the failure to make a claim within six months of the date of the accident was occasioned by reasonable cause or not : " No doubt the relevant facts should be found by the learned judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute." Another authority which supports the same view is that of Lord Herschell in *Great Western Ry. Co.* v. *McCarthy*. (4) That was a case which raised a point which has frequently been before the Courts, a point under the Railway and Canal Traffic Act, 1854, as to whether a railway company which accepted certain risks and rates had imposed a condition which was just and reasonable, and argument

(1) [1930] A. C. 503.
(2) [1920] A. C. 1.
(3) [1920] A. C. 31.
(4) 12 App. Cas. 218.

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has taken place from time to time on that point. Lord Herschell there quotes from Bowen L.J. in another case, and says (1): "I may remark before I proceed further, that, in my opinion, the question whether a contract is just and reasonable within the meaning of the statute must be determined by the Court or judge alone, and that it is not a question proper to be left to a jury, even though questions of fact be necessarily involved in its determination." Then again there are the authorities dealing with actions for malicious prosecution where it is necessary to show the presence or absence of reasonableness, and these also I need not dwell upon, since they have been mentioned by my Lord. In my opinion, the question of reasonableness is a question of law upon facts found which may, therefore, under s. 17 of the Act of 1888 properly be considered by this Court.

In these circumstances, I come to the judgment in this particular case. Although Mr. Blake Odgers had been maintaining with some force in the course of the proceedings that s. 4 of the Act of 1923 was a bar in the circumstances of this case to this application succeeding, I cannot find any direct consideration of that point in the judgment of MacKinnon J. If it is, as I think it is, at the forefront of the whole right of the application in this case, it is perhaps unfortunate that it is not dealt with by that learned judge, but it is dealt with by Sir Francis Taylor, a very eminent and learned judge, who says that he is speaking on behalf of all the members of the Court, and he favours us with the reasons why he thinks that in the circumstances of this case Mr. Leyson was unreasonable; that being a compendious phrase to cover both limbs of s. 4, sub-s. 1 (*d*), of the Act of 1923. What Sir Francis Taylor says is this: "I will just add, in order to make it clear in deference to Mr. Blake Odgers' point under s. 4 in case any question might arise upon it, that the condition required by s. 4 has, in the opinion of all of us, been satisfied in this sense, that Mr. Leyson was unreasonable in refusing to grant the right because he has all through insisted upon a dead rent of 275*l.*, a royalty of 7*d.* and 1*d.* wayleave, none of which this Court has thought right to grant."

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(1) 12 App. Cas. 229.

Now, as I read the correspondence in this case, and the evidence, both of which I have considered carefully, and neither of which, I think, it is necessary to read again in Court, the essential difference between the parties in this case was not a question of quantum at all, but was a question whether or not Mr. Leyson should receive a covenant from the applicants, Glassbrook Brothers, Ld., diligently to work the mine, on which they said, without any ambiguity several times, after the material dates, which I agree with my Lord do not go back further than the date stated in the earliest letter mentioned in the application—namely, December 19, 1931, that they would not agree to those terms. I am not citing the actual letters, but in substance they say: "We may agree; it depends on trade conditions," but they are not prepared to say they will work the mine diligently.

Now MacKinnon J. agrees, as I read his judgment, that really what Mr. Leyson was demanding was what he was entitled to. What the learned judge says, in effect, is this: "The best way of satisfying Mr. Leyson's proper requirements that they should work diligently is to impose upon them a dead rent and that dead rent, because they do not wish to pay money for nothing, will have the effect of making them work diligently and will, therefore, satisfy Mr. Leyson's demand." Now, with great respect, I doubt very much whether the payment of a dead rent would necessarily have that result. There are passages in the authorities, two of which I will mention, which show very clearly that the question of working diligently and the question of paying dead rent are two entirely separate matters. In *Jegon* v. *Vivian* (1) this is said by Erle C.J.: "Beyond the royalty, a money rent"—that is the dead rent—"is also usually reserved. This money rent is some security that the mine will be worked, as it is a dead loss if no coal is raised; it is also some security that the duration of the lease will be limited to the time in which all the coal will be raised," and so on. There the Chief Justice is at pains to put it no higher than that. He says the money rent is some security that the mine will be worked.

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(1) L. R. 1 C. P. 9, 34.

The second passage which I would cite in this connection is in *Strelley* v. *Pearson.* (1) Fry J., as he there was, speaking of the dead rent, said (2): "Here the contention is that the lessee, if he cannot work at a profit, has a right to escape from the payment of the dead rent which is reserved during the term." That was the argument, that because the lessee could not work he need not pay a dead rent. Then he goes on: "That argument, as it appears to me, is resorted to simply because no better can be adduced, and it is one which cannot possibly succeed in inducing me to hold that such a clause is usual. The two things"—that is the obligation to work and the payment of dead rent—"are plainly very different." But be that as it may, seeing that MacKinnon J. has taken the view that in practice the dead rent would be an efficacious means of enforcing what Mr. Leyson had been asking for, how can it then be said that Mr. Leyson has been unreasonable in asking for that which MacKinnon J. has said he is entitled to, though by different machinery from the machinery of a covenant diligently to work? Though I think the view of the Court is that expressed by Sir Francis Taylor—namely, that the unreasonableness consisted in asking for certain sums of money, and it has been pointed out that, in fact, Mr. Leyson was offered on that point by the applicants more than the amount awarded—not in every particular, but broadly speaking, that to my mind is immaterial here, because the real issue was not the money but the covenant to work.

I say nothing here about the question of national interest which was argued by Mr. Upjohn, because in my view the tribunal accept the view that there is a necessity for the persons who acquire this right to show that they intend to work. All they say is that that can be achieved by means of putting upon them the burden of a dead rent. I think it is impossible, in those circumstances, seeing that the tribunal in substance have accepted Mr. Leyson's essential condition, to say that he has been unreasonable in asking for that which in substance the tribunal have given him, though given him in another and unsatisfactory form.

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(1) 15 Ch. D. 113. (2) Ibid. 118.

In my opinion, therefore, the applicants, Messrs. Glassbrook Brothers, fail to show Mr. Leyson has refused unreasonably to grant the right or that he has demanded terms having regard to the circumstances which are unreasonable. Therefore, the appeal must succeed.

I would only add this. My Lord has made reference to a number of cases, some of which were cited by Mr. Upjohn and some not, which say that in any event there would be here an appeal, because the decision of fact here—and it would be a decision of fact—made by the tribunal under s. 4 is not a decision of fact on the merits of the question which they have to decide, but is supplementary and conditional or collateral in order to give them jurisdiction. I do not feel it is necessary for my purpose to decide that question, or whether the words of s. 17 of the Act of 1888 are so strong as to prevent the Court following what appears to me to have been the principle established by cases such as *Bunbury's* case. (1) It does not become necessary to decide that point in the present case, because if it is a question of law with regard to reasonableness or unreasonableness and if that question of law is open to us and if we come to a conclusion upon it adverse to the view taken in the Court below, that decides the case ; but, speaking for myself, I would say that had it been necessary to consider that point in greater detail I should have been inclined to the view which has already been expressed by my Lord.

ROMER L.J. I agree that this appeal should be allowed. If I thought that the question of whether Mr. Leyson had made unreasonable demands, that is to say, had demanded unreasonable terms, within the meaning of s. 4, sub-s. 1 (*d*), of the Act of 1923, was merely a question of fact, it would be necessary to consider whether s. 17, sub-s. 1, of the Railway and Canal Traffic Act, 1888, did not preclude this Court from entertaining the appeal. I do not, however, think it necessary to decide that question, inasmuch as I have arrived at the conclusion that that question is either a question of law or a mixed question of law and fact—it matters not which—and that having regard to the evidence before the Commissioners they could not properly decide that question adversely to the appellant.

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(1) 9 Ex. 111, 140.

Now, the conclusion that it is a question of law, or a mixed question of law and fact, is amply warranted by the authorities to which my Lords have referred. But, apart altogether from authority, it is clear that the word "reasonable" is a relative term and that its meaning depends upon the context in which it is found; in other words, what has to be considered is whether Mr. Leyson has made unreasonable demands within the meaning of this Act. That being so, it is obviously a question of law or a mixed question of law and fact.

In considering the question of whether Mr. Leyson did or did not make unreasonable demands, we have been warned by learned counsel for the respondents that we are not entitled to look at anything that happened after the application was made to the Commissioners. For the moment I will obey that injunction and consider the state of affairs as they existed on April 29, 1932, when the application was made. It was this, going no further back than 1927. In 1927 long negotiations had taken place between the parties, without prejudice, with a view to arriving at an arrangement, but such negotiations had not been successful. I am quite willing to assume that during those negotiations Mr. Leyson was as unreasonable as possible; but after those negotiations came to an end nothing took place at all, until on December 19, 1931, following upon an interview that had taken place, a letter was written on behalf of the respondents stating certain terms upon which they were prepared to take a lease for thirty years, I think it was, of the coal seams belonging to Mr. Leyson. Mr. Leyson did not deal with those terms in the correspondence which ensued; all he did was to state that he was not willing to consider any terms unless there was to be included in the lease a covenant to work. That is the only demand he made. Now a man does not make an unreasonable demand unless it be a demand that no reasonable man would make. I confess I cannot understand how anybody can suggest that it was an unreasonable demand for Mr. Leyson to make when granting a lease for thirty years, to say that the lessees should covenant to work the minerals. A covenant to work the minerals in some form or another is always inserted in every mining lease—and certainly no mining lease has been brought to our attention in this case which omits such a covenant. Mr. MacSwinney—and a greater authority on this subject never lived—in his work on Mines, 5th ed., p. 133, states: "The lessor of a mine or quarry should always stipulate for a combination in the *reddendum* of fixed or dead rent, and of royalty. He will, by this means, ensure the receipt, on the one hand, of a yearly sum of a specified amount, however unproductive the demised property may prove; and, on the other hand, of a sum proportionate to its productiveness, if it prove productive." Of course, that necessarily implies that there is a covenant to work, because otherwise the lessor cannot compel the lessee to make the mine productive. We also have the authority of the solicitor for the respondents in this case. Mr. Harris, who is not only the solicitor for the respondents, but, as I understand, one of the directors of the respondent company, and a gentleman with knowledge of the mining industry, was asked in re-examination about this matter. "(Mr. Bamber:) A proper covenant to work is a natural part of every mining lease, is it not? (A.) In every case for the protection of the lessor." Even if it were not always necessary in every case it is most assuredly necessary in this case; that is to say it was most reasonable to demand such a covenant in this case. One cannot read the Acts of 1923 and 1926 without seeing that the object of the Legislature was to ensure the working of minerals where that working was being held up to the prejudice of the national interests by reason of the fact that the owner of the minerals either could not, or would not, work them himself. And when granting a lease of minerals in respect of which an application had been threatened, and had indeed once been made to the Court, in order to obtain a grant, or a right, to work them, inasmuch as it must be taken that those are minerals which ought to be worked in the national interest, it was most reasonable on the part of the lessor to say: "I am not going to hand over to you for thirty years the option of saying whether those minerals shall remain sterile during those thirty years or not." Indeed MacKinnon J., as has been pointed out, himself thought it was reasonable on the part of the lessor to secure that the minerals should in fact be worked, but he thought the appropriate working of the minerals would be secured by the reservation of a dead rent. With the greatest possible respect to the learned judge that is not so in any case, because in reserving a dead rent you never do secure the working of the minerals beyond sufficient to produce the dead rent, and you may not even secure that. But in this particular case there was another reason why the reservation of the dead rent would not secure, or necessarily secure, the working of the minerals—because MacKinnon J. directed that the dead rent of 240*l.* a year which he said was to be reserved was to be a dead rent not only in respect of coal and fireclay, but also in respect of the wayleave which was to be granted in respect of the Duke of Beaufort's coal to the south; and it might well be that that wayleave was of such importance to the lessees that they could well afford to pay a 240*l.* dead rent and leave the minerals unworked during the whole of the time.

Now, as I have said, the only refusal made before the application was made, was a refusal to grant a lease except upon the terms that it included a covenant to work, and that, in my opinion, was, so far from being unreasonable, a most reasonable thing for the lessor to insist upon. But even if his refusal was to be taken as a refusal of the terms offered, it must be remembered that one of the terms offered was a dead rent of 150*l.*, and the Commissioners had themselves testified to the reasonableness of Mr. Leyson's objection to that by awarding him a dead rent of 240*l.*

I said I would obey, for the time being, the injunction which was laid upon me by learned counsel for the respondents. I now proceed to disobey that injunction because the Commissioners in the Court below, upon whom no doubt a similar injunction had been put, disobeyed it. Sir Francis Taylor, as has been pointed out, was the only member of the Commission who really in terms expressed the view that Mr. Leyson had been unreasonable, and he referred, as evidence of that unreasonableness, to the letter of June 18, 1932, which had been written by Messrs. Forster Brown & Rees, on behalf of the appellant, setting out the terms upon which Mr. Leyson was willing to grant a lease of the minerals in question. Sir Francis Taylor said he thought, or the tribunal thought, that Mr. Leyson was unreasonable in demanding 275*l.* dead rent which had not been granted by the Commissioners, and a 1*d.* wayleave for the Duke of Beaufort's coal which again had not been granted by the Commissioners. With the greatest respect to the tribunal, I wish to point out that that letter did not amount in any sense of the term to a demand of any terms. It set out what were called tentative terms, and the use of that word "tentative" obviously meant to indicate, and should have indicated, to the other side that this was not an ultimatum on the part of Mr. Leyson, but the putting forth of terms which might form the basis of negotiation. It was not a demand. In the next place, even if it had been a demand, it is impossible, in my opinion, to say in the circumstances of the case, and having regard to all the facts which have been found by the Commissioners, that that was a demand which no reasonable man could put forward.

For those reasons I am of opinion that the Commissioners arrived at a wrong conclusion on the question of law in holding that Mr. Leyson had demanded unreasonable terms within the meaning of the Act.

Appeal allowed.

Solicitors for appellant: *R. T. Leyson, Swansea.*

Solicitors for respondents: *T. D. Jones & Co., for Edward Harris, Swansea.*

W. I. C.

1933
Jan. 13.

COHEN AND MOORE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—Settlement—Verbal Declaration to hold Securities on Trusts of Subsequent Deed—Subsequent Deed of Trust of other Securities of less Value—Declaration and Deed whether one Single Transaction—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 62; *s.* 104, *sub-s.* 1; *First Schedule,* "*Settlement.*"

A deed of settlement executed on June 24, 1931, after reciting, as was the fact, that on May 20, 1931, for the same consideration as was mentioned in the deed, which then existed in draft form, the settlors had verbally declared that they would thenceforth, until trustees were appointed in their place, hold the securities mentioned in the first and second schedules thereto, being of the value of 55,344*l.*, as trustees upon the same trusts as would be set forth in respect of the securities mentioned in the third and fourth schedules thereto, being of the value of only 1512*l.*, when the same were formally transferred, went on to witness that in consideration of matters therein mentioned the settlors thereby assigned and transferred to the trustees the securities mentioned in the third and fourth schedules, that the trustees should stand possessed of all the property and securities vested in them upon certain specified trusts, and that the settlors thereby appointed the trustees of the settlement to be the trustees of the securities mentioned in the first and second schedules thereto. A question having arisen as to the stamp duty with which the deed was chargeable:—

Held, that, although the verbal declaration of trust had been made before the deed, the two nevertheless formed one single transaction and that the deed was chargeable under the head "Settlement" in the First Schedule to the Stamp Act, 1891, with ad valorem stamp duty on the total value of the property mentioned in all its four schedules—namely 56,856*l.*

Horsfall v. *Hey* (1848) 2 Ex. 778 and *Garnett* v. *Commissioners of Inland Revenue* (1899) 81 L. T. 633; 48 W. R. 303 applied.

1933

COHEN AND MOORE v. INLAND REVENUE COMMISSIONERS.

CASE stated by the Commissioners of Inland Revenue.

On July 3, 1931, an instrument was presented on behalf of Barry Baruch Cohen and Harold Mead Moore (hereinafter called "the trustees") to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which it was chargeable. The instrument (hereinafter called "the deed") was a deed described as a settlement dated June 24, 1931, and made between Solomon Millard of the first part, Rosetta Millard, his wife, of the second part, and the trustees of the third part.

The deed contained recitals that Solomon Millard for the same consideration as was thereinafter mentioned for those presents did on May 20, 1931, in the presence of William Frederick Tidyman and Ariel Lionel Solomon verbally declare that he would thenceforth, until trustees were appointed in his place, hold the securities mentioned in the first schedule thereto as trustee upon the same trusts as would be set forth in respect of the securities mentioned in the third schedule thereto when the same were formally transferred, and that Rosetta Millard for the same consideration as was thereinafter mentioned for those presents did on May 20, 1931, in the presence of W. F. Tidyman and A. L. Solomon verbally declare that she would hold thenceforth and until trustees were appointed in her place the securities mentioned in the second schedule thereto as trustee upon the same trusts as would be set forth in respect of the securities mentioned in the fourth schedule thereto when the same were formally transferred.

The testatum and clauses 1, 2 and 3 of the deed were as follows: "Now this settlement witnesseth and it is hereby declared as follows: (1.) In consideration of Solomon Millard and Rosetta Millard having agreed with one another to bring into settlement for the benefit of each other and/or their issue the securities belonging to each of them respectively set out in the third and fourth schedules hereto to the intent that the said Rosetta Millard and/or her issue may have the benefit of an interest in the securities mentioned in the third schedule hereto to the extent hereinafter provided and that the said Solomon Millard and/or his issue may have an interest in the securities set out in the fourth schedule hereto to the extent hereinafter provided in the same way as was provided by the said verbal declarations whereby in consideration of the interest given to Rosetta Millard and/or her issue in the securities mentioned in the first schedule hereto and the interest given to Solomon Millard and/or his issue in the securities mentioned in the second schedule hereto the said verbal declarations were made The said Solomon Millard hereby assigns and transfers unto the trustees the securities mentioned in the third schedule hereto And the said Rosetta Millard hereby assigns and transfers unto the trustees the securities mentioned in the fourth schedule hereto To Hold the said securities mentioned in the third and fourth schedules hereto upon the following trusts, namely:

(2.) The trustees for the time being of the securities hereby settled and assigned and transferred to them shall stand possessed of all the property and securities vested in them Upon Trust (*a*) To permit the same or any part thereof to remain in their present form condition or state of investment so long as they in their unfettered discretion shall think fit or may at any time or times at the like discretion sell the same or any part thereof and at the like discretion invest all moneys produced thereby as and when received in the names of the trustees in or upon any investments whatsoever whether a trust security or not as they may think in their unfettered discretion desirable without being liable to account therefor or in respect of any loss arising in connection therewith (*b*) From time to time to pay the income of the trust funds brought into this settlement by the said Solomon Millard and whether vested in the trustees by this assignment herein contained or by the appointment of new trustees herein made to the said Solomon Millard to the said Rosetta Millard or either of their two children, namely, Olgar Sadie Fisher and Derek Edward Millard or to one or more of them in such shares as the trustees may in their unfettered discretion think fit but no trust shall be deemed to be hereby constituted in favour of the said Solomon Millard Rosetta Millard or either of the said children and the trustees may in their unfettered discretion instead of paying and distributing the income of the trust securities to or amongst one or more of the said persons hereinbefore mentioned postpone such payment and distribution or accumulate the said income or any part thereof during such period or periods as they may think fit and the law permit for the benefit of the issue of the children hereinbefore mentioned And after the death of both the said Solomon Millard and Rosetta Millard and their said two children and the survivor of them the trustees shall sell and realize the said trust funds and divide the same into two equal parts and the trustees shall hold one equal half part of the said trust funds Upon Trust to divide the same among the issue of the said O. S. Fisher and the other equal half part among the issue of the said D. E. Millard but if either the said O. S. Fisher or D. E. Millard shall die without issue then the issue of the other shall have such share added to their share for equal division (*c*) From time to time to pay the income of the trust funds brought into this settlement by the said Rosetta Millard and whether vested in the trustees by the assignment herein contained or by the appointment of new trustees herein made to the said Solomon Millard the said Rosetta Millard or any of their children, namely: Gerald Samuel Millard O. S. Fisher and D. E. Millard or to one or more of them in such shares as the trustees may in their unfettered discretion think fit but no trust shall be deemed to be hereby constituted in favour of the said Solomon Millard Rosetta Millard or any of the said children and the trustees may in their unfettered discretion instead of paying and distributing the income of the trust securities to or amongst one or more of the said persons hereinbefore mentioned postpone such payment and distribution or accumulate the said income or any part thereof during such period or periods as they may think fit and the law permit for the benefit of the issue of the children hereinbefore mentioned and after the death of both the said

Solomon Millard and Rosetta Millard and their children and the survivor of them the trustees shall sell and realize the said trust funds and divide the same into three parts and the trustees shall hold one equal third part of the said trust funds upon trust to divide the same among the issue of the said children the issue of each of the said children taking one third share of the whole equally divided among them but if any of the said children shall die without issue then the issue of the other children shall have such share added to their share for equal division but if either of the said children shall die without issue then the issue of the other child shall have such share added to their share for equal division.

(3.) And the said Solomon Millard and Rosetta Millard hereby appoint the trustees of this settlement to be the trustees of the securities mentioned in the first and second schedules hereto."

The value at the date of the deed of the moneys, stocks and securities mentioned in the various schedules to the deed (not including therein the value of the freehold ground rents and the freehold property mentioned in the first schedule to the deed) was as follows (ignoring shillings and pence) :—

First schedule	£46,870
Second schedule . . .	8,474
Third schedule	676
Fourth schedule . . .	836
	£56,856

The Commissioners were of opinion that the deed was chargeable under the head of charge "Settlement" in the First Schedule to the Stamp Act, 1891 (1), with duty amounting

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(1) The Stamp Act, 1891, provides :—

Sect. 62. "Every instrument . . . . whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property.

Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings."

Sect. 104: "(1.) Where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby to 142*l.* 5*s.*, being ad valorem duty at the rate of 5*s.* for every 100*l.* and every fractional part of 100*l.* of the said sum of 56,856*l.*

It was contended by the trustees that the deed was chargeable with ad valorem duty under the head of charge "Settlement" in the First Schedule to the Stamp Act, 1891, on the values of the moneys, stocks and securities comprised in the third and fourth schedules only, and in support of their contention they submitted to the Commissioners a memorandum or declaration by W. F. Tidyman and A. L. Solomon dated May 26, 1931. (1)

The Commissioners assessed the duty at 142*l.* 5*s.* in accordance with their opinion, and the deed had been stamped in conformity with that assessment, and the trustees being dissatisfied with that assessment had in pursuance called upon the Commissioners to state and sign a case under s. 13 of the Stamp Act, 1891, and the Commissioners stated and signed this case accordingly.

The question for the opinion of the Court was whether the instrument was chargeable with the duty of 142*l.* 5*s.* in accordance with the assessment of the Commissioners, and if not with what duty the deed was chargeable.

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the settlement is made or agreed to be made is to be charged with ad valorem duty in respect of that money."

. . . . .

"First Schedule.

Stamp Duties on Instruments.

. . . . .

£ s. d.

Settlement.—Any instrument, whether voluntary or upon any good or valuable consideration, other than a bonâ fide pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite or certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever:

For every £100, and also for any fractional part of £100, of the amount or value of the property settled or agreed to be settled 0 5 0

(1) This memorandum, so far as material, is set out below in the judgment of Finlay J.

1933

COHEN AND MOORE v. INLAND REVENUE COMMISSIONERS.

Topham K.C. and *Clement Edwards* for the appellants. The deed, so far as regards the moneys, stocks and securities mentioned in the first and second schedules, is not liable to an ad valorem duty as upon a "settlement" within the meaning of the Stamp Act, 1891, s. 104, and First Schedule. (1) It is not itself a settlement, because that property is not thereby brought under the trusts, which had been declared previously. The verbal declaration of trust was complete in itself and the deed followed later, so that there were two distinct transactions. The verbal declaration did not attract stamp duty, and the subsequent deed was not an instrument "whereby any . . . . sum of money . . . . stock, or . . . . security, is settled or agreed to be settled" under the Schedule to the Act. The deed only contains declarations that the property shall be held upon the trusts of the settlement, and that does not make it a settlement of that property: *Massereene* (*Viscount*) v. *Commissioners of Inland Revenue.* (2)

Sir Boyd Merriman S.-G. and *J. H. Stamp* for the Crown. The deed as regards the moneys, stocks and securities in all its schedules is a "settlement" within the meaning of the Stamp Act, 1891, and liable as such to ad valorem stamp duty. The verbal settlement and the deed were substantially one transaction, and not distinct transactions, as in *Massereene* (*Viscount*) v. *Commissioners of Inland Revenue.* (2) In the case of *Horsfall* v. *Hey* (3) it was held that a memorandum referring to a previous sale required a stamp as a conveyance, and the headnote to the report is: "Any instrument which operates as a record of the transfer of property is a conveyance within the Stamp Act." The case of *Garnett* v. *Commissioners of Inland Revenue* (4) is to the same effect. In the course of his judgment in that case Channell J. said: "It seems to me that the question whether this is to be stamped as a conveyance is very much the same as the question which has arisen over and over again on that rather awkward definition in the Bills of Sale Act about a receipt being a conveyance; and the question is whether it is one transaction." Here the two transactions are one, and in respect of the value of the securities in all its schedules the deed is liable to stamp duty as a settlement under the Act of 1891, s. 62, and First Schedule. (1)

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(1) See note (1) ante, pp. 130, 131.

(2) [1900] 2 Ir. R. 138.

(3) 2 Ex. 778.

(4) 81 L. T. 633, 638; 48 W. R. 303.

Topham K.C. in reply. In both *Horsfall* v. *Hey* (2) and *Garnett* v. *Commissioners of Inland Revenue* (3) the deed actually effectuated the trusts. If the verbal declaration of trust made in this case five weeks before the execution of the deed effectively created the trust, so that the document is not a "settlement," it is for the Legislature and not for this Court to remedy the loss of stamp duty in such cases. The Stamp Act should be construed strictly and not in favour of the Crown. The headnote in the report of *Horsfall* v. *Hey* (2) is too wide.

FINLAY J. In this case I have arrived at the conclusion that the view taken by the Commissioners was correct. I think the matter is by no means free from difficulty. I am going to discuss it, not at great length, but sufficiently, I hope, to make my view intelligible. I may say at once that I have been greatly assisted in arriving at a conclusion by the two cases of *Horsfall* v. *Hey* (2) and *Garnett* v. *Commissioners of Inland Revenue* (3), and especially by the judgment in the latter case of Channell J., who always discussed these subjects with great clearness and fullness.

The matter arises upon the heading "Settlement" in the First Schedule to the Stamp Act, 1891. [His Lordship read the definition of the term there given, and continued as follows :]

The facts in this case are very clearly, and I think very fairly, set out in the Case stated.

The question is as to the stamp exigible upon an instrument dated June 24, 1931, which is presented for adjudication. It is clear, and is common ground, that with regard to certain securities which are set out in the third and fourth schedules to that instrument the instrument is a settlement, and is accordingly stampable ad valorem with reference to the securities set out in those two schedules. But the securities set out in those two schedules are relatively small of value. The exact details with regard to them are set out in the Case, which shows that the value of the securities in the third schedule is 676*l.*, and the value of those in the fourth schedule is 836*l.* In that deed there are two other schedules, the first and the second schedules, and in those schedules are set out a list of securities of very much greater value. It is proper to mention that three of the matters set out appear to be freehold ground rents of substantial value. The point to be decided is whether stamp duty is exigible ad valorem in respect of the securities and other matters set out in the first and second schedules.

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(1) See note (1) ante, pp. 130, 131.

(2) 2 Ex. 778.

(3) 81 L. T. 633; 48 W. R. 303.

The contention which was ably put before me on behalf of the appellants was that stamp duty was not exigible in respect of the first and second schedules, for the reason that as regards the matters in those schedules there was by this deed no settlement at all. It was said that about five weeks previously to the date of the deed there had been a verbal declaration of trust with reference to those securities which was a valid and subsisting declaration of trust, and therefore the deed could not and did not operate with regard to them, or anyhow did not operate with regard to them except as a creation of new trustees, and, possibly, as a record of an event which had actually occurred in the past. That, in substance, was the argument which was addressed to me on behalf of the appellants. In considering that argument it is necessary to look at a memorandum or record by two solicitors' clerks in which they say that they were present on May 20, 1931, at the offices of Messrs. Cohen & Cohen, that Solomon Millard and Rosetta Millard then made verbal declarations of trust; that Solomon Millard stated "that he held and would thenceforth hold the securities hereinafter mentioned in schedule 1 of this our declaration as trustee until new trustees were appointed on the trusts set out in a draft deed of assignment settlement and trust relating to other securities intended to be transferred pursuant to such deed"; and that Rosetta Millard, the wife, then made a similar declaration with reference to the funds set forth in the second schedule. That, in substance, is the record, which was tendered to the Commissioners and is before me, of the transaction which took place on May 20, 1931. The record was apparently made on May 26, 1931, that is six days after the events which it records. It certainly is rather unfortunate that in the recital to the settlement (for it is admittedly a settlement, of course, as to the third and fourth schedules) of June 24, 1931, the transaction is somewhat differently stated. It is there set forth that the declaration of Solomon Millard was that "he would . . . . hold the securities mentioned in the first schedule thereto as trustee upon the same trusts as would be set forth in respect of the securities mentioned in the third schedule thereto, when the same were formally transferred," and that the declaration of Rosetta Millard was in corresponding terms. That is not quite the same as the declaration expressed in the record of the clerks, though I am not prepared to decide this case on any such narrow point as that.

It was argued by the Solicitor-General on behalf of the Crown that there could not be a trust created in the terms in which it is said that this verbal trust was created. The argument was, if I rightly followed it, that inasmuch as there was an unfettered discretion in the trustees, who of course were other persons, and inasmuch as the husband and wife said that they held as trustee upon the terms expressed in the draft of the deed which was apparently there in the office at the time, the unfettered discretion prevented any operation of the trust. I think that that submission might be right as to income, but it appears to me clear that as to the capital a valid trust might be, and could be, created; and I should not be prepared to decide the case upon that basis. I think, however, that the Crown is right on what may be regarded as the main point in the case—namely, whether or not there was here a separate and independent transaction apart from the deed. That is a point which does not depend upon a precise reading of any document, or upon differences such as there are here between one document and another. I think that when the facts of this case are considered, both the admitted facts and the facts which anybody who looks at the documents and who knows anything of the way these things are done must perceive to be the facts, it becomes, I will not say a clear case, because I have found it to be one of some difficulty, but a reasonably clear case coming within the principle of the two decisions of *Horsfall* v. *Hey* (1) and *Garnett* v. *Commissioners of Inland Revenue.* (2)

I am disposed to agree with Mr. Topham that the head-note in *Horsfall* v. *Hey* (1) is stated somewhat too widely, but the principles as laid down by Parke B. appear to me to be important. I need not discuss that case at length, because I think it is enough that I should refer to the judgment of Channell J. in *Garnett* v. *Commissioners of Inland Revenue* (2), by which, as I have already indicated, I have been much assisted. I do not think it is necessary that I should read the whole judgment, which is rather long, but I will read one passage from it which is as follows : " If this argument " (that is the argument for the appellant) " is good, it seems to me that by paying your money first and executing your deed afterwards you could always get out of the ad valorem stamp. That cannot possibly be so. It seems to me that the question whether this is to be stamped as a conveyance is very much the same as the question which has arisen over and over again on that rather awkward definition in the Bills of Sale Act about a receipt being a conveyance ; and the question is whether it is one transaction. If there is a clearly independent transaction and it is not all part of one transaction, then the thing would stand on a different footing. It seems to me that if the parties dissolved their partnership in 1896 and transferred all assets and wound the whole thing up, and then in the year 1897 it occurred to them that it would be rather better to have a release and a mutual document to set it all right; and in the year 1897 they had executed a document which said: Whereas the whole of the affairs in this partnership were wound up in the year 1897," he says by a slip, but he means in the year 1896, "and everything was settled between the parties, and so and so, and whereas one of them has requested to have a release or to have a particular covenant, or something of the kind, put in (there are some particular covenants in this case), that then they executed a deed which was a separate transaction and appeared by the deed to be so, that would not be liable to be stamped with an ad valorem stamp; but where according to the appearance of the deed it is a deed which practically effects a transaction, just as this memorandum in *Horsfall* v. *Hey* (1) effected the transaction, then it is certainly a 'release upon a sale.'"

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(1) 2 Ex. 778.

(2) 81 L. T. 633, 637, 638.

In the present case one has to take into account the fact that the verbal statement was, as proved by the evidence, made five weeks only before the deed was executed, or in other words that five weeks after the statement this deed was made. One has to take into account the fact that the deed was certainly in draft at that time, because the declaration says that express reference was made to the draft deed of assignment and to the trusts therein set out. One takes into account the fact that in this deed the trust created with reference to the first and second schedules is set out. One takes into account the fact, which I think I ought to draw as an inference, that there was no real distinction between the securities and other matters set out in the first and second schedules and those set out in the third and fourth schedules except that the first two schedules contained the securities of much the greatest value. Having regard to these facts I cannot resist the view that what was being done here was that these securities in all the four schedules were being settled. I think that the splitting up of the securities was an artificial splitting up. I think that the transaction was really all one transaction, and that, being one transaction, the whole was recorded in the document—the only document which has been drawn up—which is the settlement. On this broad ground the argument on behalf of the Crown has mainly proceeded, and while I regard the case as by no means free from difficulty I decide it on this broad ground and not on any of the narrower grounds which have been put forward. I think the Crown is entitled to succeed, and the appeal will accordingly be dismissed.

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(1) 2 Ex. 778.

Appeal dismissed.

Solicitors for appellants: *Cohen & Cohen.*
Solicitor for Crown: *The Solicitor of Inland Revenue.*

J. R.

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THE KING *v.* ALBERT DISNEY.

Criminal Law—Indictment—Count containing Two Offences stated in the Alternative—Duplicity—Uncertainty—Night Poaching—Indictments Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 90), *Sch. I., r.* 5—*Night Poaching Act,* 1828 (9 *Geo.* 4, *c.* 69), *s.* 1.

The appellant was convicted on a count of an indictment which charged that he "by night unlawfully took or destroyed game or rabbits in land at C. . . . . or was in the said land by night with a gun, net, or other instrument for the purpose of unlawfully taking or destroying game," contrary to s. 1 of the Night Poaching Act, 1828:—

Held, that the count was bad, as it alleged two offences in the alternative and it was impossible to say of which offence the appellant had been convicted.

Rex v. *Molloy* [1921] 2 K. B. 364 followed.

APPEAL against conviction.

The appellant, Albert Disney, was charged at Leicestershire Quarter Sessions on January 3, 1933, on an indictment which contained three counts. The first count charged him that he "on December 13, 1932, in the county of Leicester, by night unlawfully took or destroyed game or rabbits in land at Croxton Kerrial, occupied by the Belvoir Estates Co., or was in the said land by night with a gun, net, or other instrument for the purpose of unlawfully taking or destroying game," contrary to s. 1 of the Night Poaching

Act, 1828. (1) The other counts alleged two previous convictions under the same section. The appellant was found guilty on the first count and not guilty on the other two counts. The record was as follows: " Verdict. Guilty to first count—night poaching." He was sentenced to three years' penal servitude. He appealed against his conviction.

Stimson for the appellant. The appellant was found guilty on the first count of the indictment; but that count is bad for duplicity and uncertainty, as it alleges two offences in the alternative, and the appellant does not know of which of the two offences alleged in that count he has been convicted. Objection was taken at the trial that the first count of the indictment was bad. The objection was overruled, and it was stated that the count followed a precedent given in Archbold's Criminal Pleading, Evidence and Practice, 28th ed., p. 1392. That is a bad precedent: see *Rex* v. *Molloy*. (2)

[He was stopped.]

Ling-Mallison for the Crown. It is permissible to allege two offences in the same count if they are alleged to have been done to accomplish one object: see *Reg.* v. *Jennings*. (3) In this case both of the alleged acts were alleged to have been done to further one particular object—namely, to destroy game or rabbits by night. Only one offence was in fact charged. The offence of which the appellant was convicted was that of poaching by night contrary to s. 1 of the Night Poaching Act, 1828.

[He referred to r. 5 of the Rules in Sch. I. to the Indictments Act, 1915 (5 & 6 Geo. 5, c. 90). (4)]

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(1) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1: " If any person shall . . . . by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offender shall," upon conviction, be committed to prison.

(2) [1921] 2 K. B. 364.

(3) (1844) 1 Cox C. C. 115.

(4) Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), Sch. I., r. 5: "(1.) Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative,

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The judgment of the Court (Lord Hewart C.J., Avory and Talbot JJ.) was delivered by

Lord Hewart C.J. The appellant in this case was charged upon an indictment which contained three counts. The first count was that he "by night unlawfully took or destroyed game or rabbits in land . . . . or was in the said land by night with a gun, net, or other instrument for the purpose of unlawfully taking or destroying game." It was urged in the Court below that the first count of the indictment was bad, as it charged the appellant with two offences, and reference was made to *Rex* v. *Molloy*. (1) The objection was overruled, but it seems to us a sound objection. The first count alleges two separate offences in the alternative, and the verdict was entered on the indictment as guilty to the first count—night poaching. It is impossible to say of which of the two offences alleged in the first count the appellant has been convicted. Therefore, the appeal must be allowed and the conviction quashed.

It is very unfortunate that the precedent for the first count appears in Archbold's Criminal Pleading and Practice, 28th ed., p. 1392. The italics which were in the previous edition have been omitted, but, as it stands, the precedent is one of a count which charges two different offences in the alternative.

Conviction quashed.

Solicitor for the appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities, or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence."

(1) [1921] 2 K. B. 364.

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Jan. 11, 12, 13, 16, 17, 18, 19, 20, 23; *Feb.* 15; *March* 1.

CAMMELL LAIRD AND COMPANY, LIMITED *v.* MANGANESE BRONZE AND BRASS COMPANY, LIMITED.

[1931. C. 3736.]

Sale of Goods—Contract to manufacture Propeller for a particular Ship—Plans and Dimensions supplied by Purchaser—Propeller to be to "entire satisfaction" of Shipowner and Shipbuilder—Particulars of Engines of Ship not supplied to Propeller Maker—Propeller when fitted to Ship rejected on Account of Noise—Propeller not tried on another Ship—Implied Warranty of Fitness for particular Purpose—Merchantability—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14.

A firm of propeller makers contracted with a firm of shipbuilders to make and supply two propellers of manganese bronze for two particular ships which the shipbuilders were building under contract with the owners. The propellers were to be to the entire satisfaction of the owners' representative and the shipbuilders. The propellers were to be similar in all respects and made in accordance with certain dimensions and a plan prepared by the shipbuilders and supplied by them to the propeller makers, from which the propeller makers were not to depart. The two ships for which the propellers were intended were fitted with Diesel internal combustion engines of different designs and having different critical periods. The propeller makers, however, had no detailed information as to the engines nor as to their critical periods. When one of the propellers was fitted to the ship for which it was intended it made such a noise when the engine was working at certain revolutions short of full speed that Lloyd's surveyor refused to class the ship. This propeller was never tried on any other ship. The other propeller when fitted to this ship made no noise at all and only a slight noise when fitted to the ship for which it was intended. The shipbuilders made various trials of the ship in order to locate the noise and to see whether the defect could be rectified. Eventually the propeller makers made a second propeller and subsequently a third propeller for the ship, the last of which was accepted. By reason of these facts the delivery of the ship by the shipbuilders to the owners was delayed. The shipbuilders brought an action against the propeller makers to recover the expenses they had incurred on the various trials, and also interest on the instalments of the purchase price of the ship which were not paid as early as they would have been paid if the ship had been delivered at the proper time. The propeller makers counterclaimed for the price of the two propellers which they subsequently made and supplied.

Roche J. held at the trial that the propeller was not made of defective material and that the blades of the propeller were not negligently shaped, but he held that the shipbuilders were entitled to recover damages to be assessed—but not the interest on the purchase price—as there had been a breach by the propeller makers of the implied warranty of fitness under s. 14, sub-s. 1, of the Sale of Goods Act, 1893.

On appeal:—

Held, by Scrutton and Lawrence L.JJ. (Greer L.J. dissenting), (1.) that the shipbuilders did not make known to the propeller makers the particular purpose for which the propeller was required so as to show them that the shipbuilders relied on the propeller makers' skill and judgment, and that therefore no warranty of fitness for any particular purpose could be implied under s. 14, sub-s. 1, of the Sale of Goods Act, 1893; (2.) that as the shipbuilders asked the propeller makers to make the propeller according to a plan and dimensions supplied to them by the shipbuilders the only liability of the propeller makers was to make the propeller according to the plan and in a workmanlike manner, and this they had done; (3.) that the propeller was merchantable as a propeller, and that consequently there had been no breach of s. 14, sub-s. 2, of the Sale of Goods Act, 1893; (4.) that the cause of the noise was the shape of the propeller combined with the peculiar qualities of the particular Diesel engine in that particular ship, and that the propeller makers were not responsible for that combination; (5.) that the clause in the contract that the propeller was to be to the entire satisfaction of the owners' representative and the shipbuilders did not entitle the buyers to reject the propeller, as it was made to the buyers' specification, was of good material and workmanship, and was therefore in accordance with the contract; (6.) that the propeller makers were entitled to recover on their counterclaim the price of the two replace propellers.

Medway Oil and Storage Co. v. *Silica Gel Corporation* (1928) 33 Com. Cas. 195 and *Hall* v. *Burke* (1886) 3 Times L. R. 165 applied and followed.

The following passage from Benjamin on Sale, 7th ed., pp. 662, 663, adopted by Scrutton and Lawrence L.JJ.: "Where it is part of the contract that goods shall be made according to a certain plan, or according to a certain style, shape, or form, or of specified materials, the buyer relies upon his own judgment as to the sufficiency of the plan, style, etc., or of the materials for effecting the purpose contemplated. The only liability then of the manufacturer is to execute the work according to the plan, etc., and in a workmanlike manner, and to exercise due care and skill in the selection and testing of the materials, in the absence of an express engagement on his part to produce goods which will be adapted to the buyer's purpose."

APPEAL from a decision of Roche J. in an action tried without a jury.

The plaintiffs, Messrs. Cammell Laird & Co., Ld., were shipbuilders at Birkenhead, and the defendants, the Manganese Bronze and Brass Company, Ld., were manufacturers of propellers.

The plaintiffs had contracted to build for the United Molasses Company, Ld., two vessels, No. 972, subsequently named the *Athelfoam*, and No. 973, subsequently named the *Athelbeach*, on the terms of two written contracts and in accordance with the specification and plans incorporated therein. The vessels were to be constructed under the superintendence and to the reasonable satisfaction of the engineer or other surveyor of the purchasers, and were to be constructed to be classed at Lloyd's 100 A 1 for carrying petroleum and molasses, and all things necessary to obtain this classification were to be done.

Both vessels had internal combustion engines of the Diesel type. The two engines were, however, of different types with different dimensions and different critical periods.

The plaintiffs alleged by their statement of claim that by a contract contained in various letters they agreed to purchase, and the defendants agreed to provide and sell, two propellers of identical type each to be in the defendants' special Parsons' manganese bronze a four-bladed right-handed solid propeller to be 16 feet 0 inches diameter with a pitch of 11 feet 0 inches and to have a total developed area of 80 square feet in four blades maximum B.H.P. 2150 at 105 R.P. minute in the case of No. 972 and 2309 at 110 R.P. minute in the case of No. 973. Each propeller to be supplied finished machined complete and polished all over in highest class style, with boss bored, face and keyway cut to plaintiffs' template, edges brought up to fine lines, true to pitch; all in accordance with plaintiffs' blue print No. 206699 and ready for fitting to shaft on delivery. To be to the entire satisfaction of the owners' representative and the plaintiffs for the price of 668*l.* each. Delivery of No. 972 was required by July 14, 1930, and No. 973 by August 1, 1930. The two propellers to be similar in all respects.

The plaintiffs alleged that the defendants were specialists in the manufacture of propellers and that it was in the course of their business to manufacture and supply goods of that description. The plaintiffs further said that in their letters to the defendants they made known to the defendants the particular purpose for which the propellers were required so as to show that they relied on the defendants' skill and judgment, and that by reason thereof it was an implied term that the propellers should be reasonably fit for their purposes and of merchantable quality.

The plaintiffs said that on July 19, 1930, the defendants supplied a propeller for the *Athelfoam*, to which vessel the propeller was duly fitted, but that the propeller was not reasonably fit for its purpose and was not of merchantable quality in that at certain speeds it set up a very violent grinding and knocking noise and was not satisfactory to the owners' representative, nor to Lloyd's representative, who refused to give a classification certificate, nor to the plaintiffs.

The plaintiffs alleged that by reason of the unfitness and unsuitability of the propeller they were put to expense in trying to rectify the trouble and in carrying out further tests and trials and in connection therewith. No improvement was found, and the plaintiffs rejected the defective propeller.

The plaintiffs said that on January 22, 1931, the propeller of the *Athelbeach*, which had been supplied by the defendants in accordance with the contract and fitted to the *Athelbeach* and found entirely satisfactory, was transferred to the *Athelfoam*, and found on trial to be entirely satisfactory.

The defendants on February 3, 1931, agreed to supply, without prejudice to their position, a propeller to replace the rejected propeller. The first replace propeller was delivered by the defendants on March 16, 1931, and was tried at sea on March 24, 1931, but it likewise failed to satisfy the owners' representative and the plaintiffs, who rejected it.

The defendants on April 27, 1931, agreed to supply, reserving all rights and without prejudice to their position, another propeller to replace the two rejected propellers. This second replace propeller was delivered on June 10, 1931, and was tried at sea on June 19, 1931, when it was found satisfactory and was accepted by the plaintiffs.

The plaintiffs alleged that if the propeller supplied by the defendants on July 19, 1930, had been in accordance with the contract, the *Athelfoam* would have been delivered to the owners on November 6, 1930, and the plaintiffs would have been paid the balance of the purchase price of that vessel not later than November 20, 1930. Owing to the defendants' delay in delivering a propeller in accordance with the contract the plaintiffs were not paid the balance of the purchase price until, as to part April 30, 1931, and as to the remainder July 11, 1931, and the plaintiffs alleged that they had been deprived of 786*l.* interest thereon.

The plaintiffs alleged that by reason of the defendants' breach of contract in supplying for the *Athelfoam* a defective propeller and replacing it with another defective propeller they had been put to expense and had suffered loss and damage amounting to 5491*l.* 5*s.* 1*d.*, being the cost of running additional trials on account of the defective propellers and incidental expenses in connection therewith, and they claimed to recover 6277*l.* 5*s.* 1*d.* as damages.

The defendants by their defence denied that the plaintiffs ever made known to them the particular purpose for which the propellers were required, or that the plaintiffs relied on the defendants' skill or judgment, or that it was an implied term of the contract between the plaintiffs and the defendants that the propellers should be reasonably fit for any purpose or of merchantable quality. The defendants agreed to supply two propellers made of the material and to the drawings, measurements and specification contained or referred to in the documents referred to in para. 2 of the plaintiffs' statement of claim.

The defendants said that the propeller which they supplied to the plaintiffs on July 19, 1930, was manufactured and was in all respects in accordance with the terms of the contract specification and drawings, and they did not admit the plaintiffs' allegations with regard to the propeller. They further said that if the propeller set up the alleged grinding or knocking noise, which was not admitted, such noise was not caused by any defect in the propeller or breach of contract on their part. They said that the plaintiffs did not reject and were not entitled to reject that propeller.

The defendants admitted that they delivered the first replace propeller to the plaintiffs on March 16, 1931, and they said that such propeller was in all respects in accordance with the contract specification and drawings and that the plaintiffs did not reject and were not entitled to reject that propeller.

The defendants also admitted that they delivered the second replace propeller to the plaintiffs on June 10, 1931.

The defendants said that if and in so far as the propellers and each or either of them caused any noise as alleged, which was not admitted, such noise was due to the design and specification thereof in accordance with which the same were manufactured by the defendants under the said contract and the instructions of the plaintiffs therein contained, and/or was due to the design and construction of the ship to which they were fitted and to no breach of contract on the part of the defendants, who manufactured each of the propellers in accordance with the measurements, design and specification supplied to them by the plaintiffs, for which the defendants took and were under no responsibility.

The defendants counterclaimed to recover the price of the two replace propellers supplied and delivered to the plaintiffs at their request at the price of 668*l.* each.

Roche J., in the course of his judgment, said that the plaintiffs supplied certain drawings, and gave particulars of their requirements. Those particulars did not exhaust all the dimensions and all the matters which had to be considered. Other matters were left to be supplied and carried out in accordance with the defendants' judgment. The learned judge, after referring to the various tests with the propellers, said that he was satisfied that the refusal of the plaintiffs to accept the *Athelfoam* propeller and the first replace propeller was reasonable and indeed inevitable in both cases. The learned judge, in dealing with the question why the propellers made a noise, referred to the defendants' contention that the *Athelfoam's* propeller was not properly fitted on to the shaft and that in those circumstances there was no breach of contract, and said that he was satisfied that it was a perfectly good fit and that no want of fit produced the noise. In dealing with other causes for the noise he said that noise was the result of vibration or movement. The noise was most pronounced at the critical periods of this engine. All internal combustion engines had critical periods which differed in different engines. There were some speeds or number of revolutions at which the revolutions were made rather more irregularly than usual, and these were called the critical periods; at those periods there would be more shaking. When a propeller with a low pitched ratio was used with a Diesel engine there was more liability to noise unless the blades of the propeller were suitable for that pitch ratio, the low pitch ratio of these propellers being a predisposing tendency in the direction of more vibration. The question of the composition of the metal itself had been discussed. He thought that that had really fallen to the ground. He was satisfied that the metal in the two propellers was in all material respects the same, and he did not think that anything was due to defects in casting or to little differences in elasticity of the metal or anything of that kind. He thought that the root cause of the trouble was that the blades of the first *Athelfoam* propeller, and to some extent of the first replace propeller, were not properly shaped for their purpose. When he said that they were not properly shaped he did not mean that they were negligently shaped, but that the shape of the earlier propeller was the cause why the tendency to make a noise, which was always there, was very likely to be easily put in operation under the conditions that existed. The first replace propeller was slightly, although not a great deal, heavier than the first *Athelfoam* propeller. The *Athelbeach* propeller was heavier than either the first *Athelfoam* propeller or the first replace propeller. The second replace propeller, which was successful, was the heaviest of all the propellers. The blades of the first replace propeller were as a rule and in most places thicker than the blades of the first *Athelfoam* propeller, and the blades of the second replace propeller were thicker still. His view was that the difference between the various propellers was the reason why the first *Athelfoam* propeller made the most noise, the first replace propeller made less noise, and that the second replace propeller made still less noise. He accepted Mr. Miller's contention that if the plaintiffs satisfied him that the defendants contracted to supply a propeller which was fit for its purpose and so as not to make such a noise as to be useless on board the ship, it was not necessary for the plaintiffs to do more than to show that the propeller did make such a noise and was therefore unfit, and that if the propeller was unfit for some unknown cause, some latent defect, the suppliers must take the risk and supply another propeller. The case for the plaintiffs was that the matter fell within s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and that it was a case where the buyers by implication made known to the sellers the particular purpose for which the propellers were required, so as to show that the buyers relied on the sellers' skill or judgment, and that there was in consequence an implied condition that the goods should be reasonably fit for the purpose, that is to say, that the propeller should be reasonably fit for use as a propeller on a ship, and that it was not. The plaintiffs also said that the case fell within sub-s. 2 of s. 14, and that at all events this propeller was not merchantable. Thirdly, they said that there was a provision in the contract that the propellers should meet with the entire satisfaction of the owners' representative and of the plaintiffs, and that this propeller did not, and the plaintiffs said that for all or some of these reasons they were entitled to succeed. The defendants' case was that the case fell within the general rule of s. 14 of the Sale of Goods Act, 1893, and that there was no implied warranty or condition as to the quality or fitness for any particular purpose of the goods supplied, and that the provisos to the section did not apply. His Lordship said that he would deal first with the question whether the clause about the propeller being required to be to the satisfaction of the owners' representative and of the plaintiffs really added anything to the rights of the plaintiffs. In his opinion it did not. *Repetto* v. *Friary Steamship Co.* (1) and *Haegerstrand* v. *Anne Thomas Steamship Co.* (2), which were

(1) (1901) 17 Times L. R. 265.

(2) (1905) 10 Com. Cas. 67.

cited by Mr. Miller in opening, were very different cases; they were cases where there was an agreement to purchase a ship which was conditional upon the buyer approving of the ship when he saw it. If he did not approve there was to be no sale. His Lordship said that he did not think those cases had any application to a case like the present, where there was an agreement to do something and to do that to the satisfaction of the buyer or of a certain named person. That, he thought, was a contract to do the thing that was agreed to be done to the satisfaction of a certain person, and that person's satisfaction if bona fide and reasonable was the test whether the contract had been performed. But the person who had to be satisfied had no right to add another term to the contract and say that he was not satisfied with the goods delivered, although they complied with the contract, because he was not satisfied about something which was not in the contract. In other words, if there was a contract to make a propeller of a specified material and of certain named dimensions and there was no term in the contract that the propeller should not be unduly noisy, then the clause about satisfaction did not, in his view, entitle the buyers to reject on the ground that they were not satisfied with the propeller because it was noisy, notwithstanding the express terms of the contract had been fulfilled. He thought the plaintiffs' contention that the propeller was not merchantable because it was noisy did not arise, because he was satisfied that there was an implied contract under the section that the propeller should be fit for the purpose. It was clear from the cases that it might be shown that the buyer relied upon the seller's skill and judgment by evidence that the buyer made known to the seller the particular purpose for which the goods were required, and that the buyer need not give express evidence that he relied on the seller's skill and judgment: see *Manchester Liners, Ld.* v. *Rea, Ld.* (1); *James Drummond & Sons* v. *E. H. Van Ingen & Co.* (2) In the present case the buyers told the sellers that they required propellers, and it was clear from

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(1) [1922] 2 A. C. 74, 79.

(2) (1887) 12 App. Cas. 284, 288, 293, 295.

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the correspondence that they were to be used in connection with vessels which had Diesel engines. It was true that drawings were sent and certain dimensions were upon the drawings, and it was said that the plaintiffs relied upon their design and not upon the defendants' skill, but he thought it followed from the evidence that it was left entirely to the defendants' skill and judgment how they were to shape and make the blades and their edges. That matter in his Lordship's mind was the decisive matter on the question of noise and was left entirely to their skill and judgment. The failure of the defendants was not due to any negligence on their part. In his opinion there was nothing abnormal about the *Athelfoam* or her engines, and proof that the propeller was unsuitable on the *Athelfoam* was prima facie sufficient proof, until it was displaced, that the propeller was unsuitable generally for ships, and he found that the propeller was not fit for use as a propeller at all. He held that there was a making known to the sellers by implication of the particular purpose for which the goods were required, that is to say, for use as a propeller on a steamship, and that that making known of the purpose was done in such a manner and in such a way as to show that the buyers relied upon the skill and judgment of the sellers, and there consequently was a warranty of fitness for a specific purpose, and that warranty had been broken. The plaintiffs therefore were entitled to judgment upon their claim. The defendants' counterclaim for the price of the substituted propellers failed. The question as to the amount of damages would be sent to a referee. The plaintiffs' claim for 786*l.* for interest, however, failed. That seemed to him to be a claim for damages which depended upon a particular contract between the plaintiffs and third parties—namely, the shipowners, the terms of which were not made known to the defendants and in respect of which it could not be said that that fell within the contemplation of the parties or within the natural measure of damage.

The defendants appealed, and there was a cross-appeal by the plaintiffs on the question of the interest.

In the Court of Appeal further evidence on affidavit was admitted dealing with the measurements of the propeller of the *Athelbeach* and comparing them with the measurements of the propeller of the *Athelfoam.*

W. N. Raeburn K.C. and *H. G. Robertson* for the defendants. The judgment of the learned judge as to the cause of the noise was wrong having regard to the further evidence. He decided that the cause of the noise was due to the thickness of the leading edge of the blades of the propeller and rejected the contention of the defendants that it was due to the fitting of the propeller, which is probably the solution of the problem. The clause in the contract that the propellers should be to the entire satisfaction of the owners' representative and the plaintiffs means no more than that the owners' representative and the plaintiffs have to be satisfied that the defendants carried out what they contracted to do. The clause does not entitle the buyers to add another clause to the contract—namely, that the propeller should not be noisy, and to reject for that reason a propeller made entirely in accordance with the contract. The clause as to "entire satisfaction" would at most entitle the plaintiffs to reject the propeller, but they are not entitled to reject, because they cut two inches off the blades of the propeller and bored holes in them. The authorities with regard to "satisfaction" depend upon the particular facts of each case. In both *Repetto* v. *Friary Steamship Co.* (1) and *Haegerstrand* v. *Anne Thomas Steamship Co.* (2) there was an agreement to purchase a ship conditional on the buyer approving the ship after inspection, and it was held in both cases that the buyer was entitled to reject the ship after inspection and to recover the deposit paid by him on signing the agreement, provided he acted bona fide. Crompton J., in *Braunstein* v. *Accidental Death Insurance Co.* (3), said that "when it is agreed that an act is to be done to the satisfaction of a party it must be understood to mean reasonably to his satisfaction." *Dallman* v. *King* (1) also strongly supports the defendants' contention.

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(1) 17 Times L. R. 265.
(2) 10 Com. Cas. 67.
(3) (1861) 1 B. & S. 782, 797.

[SCRUTTON L.J. referred to *Andrews* v. *Belfield*. (2)]

In that case the plaintiff accepted an order from the defendant to build a carriage on the express condition that it should meet with the defendant's approval "on the score of . . . . convenience and taste," and it was held that the defendant was entitled (acting bona fide and not capriciously) to reject it. In *Diggle* v. *Ogston Motor Co.* (3) the defendants were genuinely dissatisfied with the plaintiff's discharge of his duties, but had no good grounds for such dissatisfaction. It was held that the defendants were entitled to succeed, as genuine dissatisfaction was sufficient to entitle them to terminate the agreement. Each case depends so much on its own facts that no case can be decisive of another case where the facts are different. The plaintiffs cannot honestly be dissatisfied with this propeller, as the defendants did not contract that it should be noiseless.

This case does not come within sub-s. 1 of s. 14 of the Sale of Goods Act, 1893. Before a case can come within that sub-section the buyer must make known to the seller the particular purpose for which the goods are required, and he must do it in such a way as to show that the buyer relies on the skill and judgment of the seller. But when the buyer gives the seller a design of the article required and asks him to make an article to that design, the buyer does not rely on the skill and judgment of the manufacturer, and no condition as to the fitness of the article for any particular purpose is implied. The rule which ought to be followed in the present case is set out in Benjamin on Sale, 7th ed., p. 662. The only liability of the defendants was to make the propeller according to the plans supplied to them by the plaintiffs in a workmanlike manner of selected material. This admittedly was done. The defendants did not contract to do anything beyond those definite things. A useful statement as to contracts to which the section applies is contained in *Hall* v. *Burke* (1), where Lord Esher M.R. said: "There were two well known kinds of contract—first, a customer might ask a manufacturer to make a machine according to a given plan or according to a plan supplied by the customer; in that case the manufacturer would only have to make the machine according to the plan and in a workmanlike manner. Secondly, a customer might ask the manufacturer to make the machine for a particular purpose, not supplying any plan, but leaving it to him to make it for that purpose; in that case, unless the contrary was expressly stated in the contract, the manufacturer would have to make a machine fit for that purpose." The present case comes within the first kind of contract. The fact that the buyers supplied the manufacturers with a plan, to which they were to work, negatives the suggestion that the buyers were relying upon the skill and judgment of the manufacturers. Roche J. relied upon *Drummond* v. *Van Ingen* (2) in support of the conclusion to which he came, but that case has no application to a case like the present one, where the buyer gave express directions to the manufacturer telling him what had to be done. In *Jones* v. *Padgett* (3) the Court of Appeal held that the defendants, having no knowledge that the plaintiff was a tailor, had fulfilled their contract by supplying goods which were merchantable as supplied to a woollen merchant, and a further condition could not be implied that the goods were fit to be made into liveries. The question as to the meaning and application of the words "merchantable quality" in s. 14, sub-s. 2, of the Sale of Goods Act was dealt with by Wright J. in *Canada Atlantic Grain Export Co.* v. *Eilers.* (4) Having regard to the circumstances of the present case, there was no warranty within s. 14 of the Sales of Goods Act that the propeller was fit for any particular purpose. The defendants were not told what type of Diesel engines the vessels would be fitted with; one type of Diesel engines may have very different critical

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(1) (1837) 4 Bing. N. C. 105.

(2) (1857) 2 C. B. (N. S.) 779.

(3) (1915) 84 L. J. (K. B.) 2165.

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(1) 3 Times L. R. 165.

(2) 12 App. Cas. 284.

(3) (1890) 24 Q. B. D. 650.

(4) (1929) 35 Com. Cas. 90.

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periods from another type. The defendants were merely told that the propeller was to be fitted in an unnamed ship fitted with an undescribed Diesel engine. That was not making known to the manufacturer the particular purpose for which the propeller was required. Sub-s. 2 of s. 14 does not apply to the present case, as this was not a sale of goods by description but merely an order for a propeller, which was not an order for goods within that sub-section. The plaintiffs only proved that the propeller was not fit for use as a propeller on a particular ship; they did not prove that it was not fit for use on another ship, and therefore they have not proved that the propeller was not merchantable.

Assuming that there was a breach of warranty under s. 14, sub-s. 1, a question arises as to the measure of damages. Prima facie the damages to which the plaintiffs would be entitled would be the price of the propeller, 668*l.* The plaintiffs, however, are claiming the cost of the trials. Those expenses were not caused by the defendants' breach of warranty but in order to find out what caused the noise, and whether or not it was caused by the rudder. Those expenses are not the natural consequences of the defendants' breach of contract. There is no authority which says that a buyer is entitled to recover as damages for breach of contract not only the price of the goods but also the cost of finding out the defect. It does not follow that damages are recoverable merely because they follow the breach.

A. T. Miller K.C. and *F. A. Sellers* for the plaintiffs. The findings of the learned judge with regard to the facts were right. He has found that there was an implied warranty that the propeller should be fit for the purpose of a propeller to the particular ship for which it was wanted, and also an implied guarantee that the article should be merchantable. There was also an express guarantee that the article should be made to the entire satisfaction of the owners' representative and the plaintiffs. In regard to all these things the defendants were in default. This was a contract between shipbuilders and expert propeller makers for the supply of a propeller for a ship which the plaintiffs were building, and the defendants delivered a propeller which was useless and also involved the plaintiffs in expense in finding out the defect. If shipbuilders give an order to propeller makers for a propeller of certain dimensions, that puts upon the propeller makers the onus of producing a propeller which not only complies with those dimensions but which is also fit for the purpose for which it is required. The dimensions and plan which the plaintiffs gave the defendants were not a specification, but left the propeller makers to produce a propeller of the dimensions required which would be a good propeller.

[SCRUTTON L.J. referred to *Medway Oil and Storage Co.* v. *Silica Gel Corporation* (1) on the implied warranty under s. 14 of the Sale of Goods Act.]

This case comes within the fourth class of cases laid down by Mellor J. in *Jones* v. *Just* (2), and the dictum of Best C.J. in *Jones* v. *Bright*. (3) " If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment " : per Lord Buckmaster in *Manchester Liners, Ld.* v. *Rea, Ld.* (4), and the learned Lord disapproved of the suggestion that no warranty can be implied under s. 14 of the Sale of Goods Act unless the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill and judgment.

On the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects : *Randall* v. *Newson*. (5) In *Hydraulic Engineering Co.* v. *Spencer* (6) manufacturers had contracted to make cylinders according to a pattern and free from defect. It appeared that the cylinders could not be made according to the plan without having a defect in them, but it was held that notwithstanding that the defect in the cylinders was unavoidable the manufacturers were liable for damages. *Drummond* v. *Van Ingen* (1) is the nearest case to the present. Lord Selborne there said (2): "I think . . . . the doctrine of implied warranty . . . . does extend to such a case as the present, if the goods, being of a class known and understood, between merchant and manufacturer, as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended." Lord Herschell also said (3): "It is true that the purpose for which the goods were required was not . . . . stated in express terms, but it was indicated by the very designation of the goods, 'coatings.' I think that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used."

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(1) 33 Com. Cas. 195.
(2) (1868) L. R. 3 Q. B. 197, 202.
(3) (1829) 5 Bing. 533, 544.
(4) [1922] 2 A. C. 74, 79.
(5) (1877) 2 Q. B. D. 102.
(6) (1886) 2 Times L. R. 554.

[SCRUTTON L.J. referred to *Shepherd* v. *Pybus*. (4)]

In *Frost* v. *Aylesbury Dairy Co.* (5) milk, which the defendants supplied to the plaintiff for consumption by himself and his family, contained the germs of typhoid fever, and the plaintiff's wife was infected thereby and died. The plaintiff brought an action to recover the expenses to which he had been put, and it was held that there was an implied condition under the Sale of Goods Act, 1893, that the milk was reasonably fit for consumption, although the defect was not discoverable at the time of the sale. When an order is given for a propeller the order is for an article which shall be fit for use as a propeller upon any ship. The judge did not decide the question of merchantability, as he said it did not arise in view of his finding in favour of the plaintiffs that there was an express warranty. As it was proved that the propeller was not suitable for this particular ship, and there was no evidence that it had been fitted to any other ship, there is a presumption that it was not fit for use as a propeller. The defendants were told that the propeller was required for a particular ship with Diesel engines; they ought to have made inquiries if they required more information.

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(1) 12 App. Cas. 284.
(2) Ibid. 288.
(3) 12 App. Cas. 293.
(4) (1842) 3 M. & G. 868.
(5) [1905] 1 K. B. 608.

The judge was wrong in holding that the clause in the contract that the propeller should be to the entire satisfaction of the owners' representative and of the plaintiffs did not add anything to the rights of the plaintiffs. If that view is correct the clause is valueless. Due weight ought to be given to each clause of the contract. The dissatisfaction must be bona fide, but if it is, the person who is to be satisfied is entitled to reject. In the present case the dissatisfaction of the owners with the propeller was both reasonable and bona fide. The clause was intended to add something to the contract besides merely complying with the dimensions specified.

The damages claimed are not too remote, they are the expenses to which the plaintiffs were put by reason of the non-compliance of the defendants with their contract. The plaintiffs are entitled to recover the reasonable costs incurred in using the propeller before deciding to reject it. The trials were reasonably necessary by reason of the noise of the propeller, which did not comply with the contract, and the expenses of the trials were caused by and inevitably followed in the natural course of events from the defendants' breach of contract. In *Smith* v. *Johnson* (1) the defendant supplied bad mortar for some building operations which were subsequently condemned, and it was held that he was liable to the plaintiff for the cost of pulling down and rebuilding. In *Frost* v. *Aylesbury Dairy Co.* (2) the damages recovered were many times the value of the article supplied.

The communication to the defendants that the propeller was to be used in a ship which the plaintiffs were building for shipowners is sufficient communication to make the makers of the propeller liable for loss incurred by the shipbuilders by reason of defects in the propeller.

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(1) (1899) 15 Times L. R. 179.

(2) [1905] 1 K. B. 608.

Raeburn K.C. in reply. The defendants were never shown the contract made by the plaintiffs with the owners for building the ship, nor were they told the date of delivery of the ship, and therefore the claim for interest on the purchase price is too remote. *Frost* v. *Aylesbury Dairy Co.* (1), with regard to the contaminated milk, and *Smith* v. *Johnson* (2), with regard to bad mortar, were different from the present case, because there the milk and mortar had not been rejected, but had been accepted and used. There is no case in which a party has been held entitled to recover the expenses incurred in finding out whether the article delivered was in accordance with the contract. On the facts of the present case no reliance was placed by the plaintiffs on the skill and judgment of the defendants. *Hall* v. *Burke* (3) and *Hydraulic Engineering Co.* v. *Spencer* (4) are really against the plaintiffs' contention. The plaintiffs succeeded in *Hydraulic Engineering Co.* v. *Spencer* (4) only because there was a term in the contract by which the manufacturers undertook to make the cylinders, not only according to pattern, but also free from defect.

In the circumstances of the present case, the design for the propeller having been supplied by the shipbuilders to the propeller makers and express instructions given to work to that design, the true principle to be applied is that laid down in Benjamin on Sale, 7th ed., p. 662, citing *Hall* v. *Burke* (3) and *Cunningham* v. *Hall.* (5) *Drummond* v. *Van Ingen* (6) is distinguishable from the present case, because there the samples, in accordance with which the cloth was manufactured, were supplied by the manufacturers themselves, and both cloth and samples contained latent defects which were not ascertainable by any reasonable examination by the buyers.

Cur. adv. vult.

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(1) [1905] 1 K. B. 608.
(2) 15 Times L. R. 179.
(3) 3 Times L. R. 165.
(4) 2 Times L. R. 554.
(5) (1862) 86 Mass. 268.
(6) 12 App. Cas. 284.

1933. Feb. 15. The following judgments were read (1) :—

SCRUTTON L.J. This appeal has occupied the Court for some time owing to the difficult questions involved, both of fact and law. Shortly stated, the point is this. The Manganese Bronze and Brass Co., a very experienced and successful company, undertaking to make propellers, amongst other articles, out of manganese bronze, received from Cammell Laird & Co., equally well known shipbuilders, an order to make two identical propellers for two ships to a plan and dimensions specified by Cammell Laird & Co. They accepted the order. One of the propellers when fitted on one of the ships made such a noise when the engines were working at certain revolutions, short of the full speed number, that Lloyd's surveyors refused to class the ship. At full speed revolutions the propeller worked perfectly satisfactorily. When the second propeller, made to the same plan and dimensions, was tried on the second ship it made some noise, "a decided hum" when running at revolutions less than full speed, but not enough to induce the owners or builders to reject it. When, however, this second propeller was tried on the first ship it ran silently at all speeds. The two propellers were ordered and intended to be identical. Unfortunately, it never occurred to any one to try propeller No. 1 on ship No. 2 in order that it might be seen whether just as propeller No. 2, noisy though not to excess on ship No. 2, was quite quiet on ship No. 1, propeller No. 1, noisy to excess on ship No. 1, would be reasonably quiet on ship No. 2. The two ships had different types of Diesel engines, different in some dimensions and in their "critical periods," an expression I will attempt to explain hereafter. There were obviously difficult and interesting questions of fact as to what caused these two nominally identical propellers, made from the same drawing, to behave in this different way. There was, further, when one had found the cause of the difference or, if the cause was undiscoverable, had concluded that, at any rate, the result was that propeller No. 1 would not combine properly with ship and engines No. 1, the difficult question of the legal result of these findings. Cammell Laird, as plaintiffs, said that the defendants had warranted: (1.) the propeller fit for its purpose, that of running properly and quietly on a normal ship with a normal Diesel engine; (2.) that the propeller they supplied was merchantable; (3.) that in any event the defendants had contracted to make the specified propeller to the entire satisfaction of the owners, the United Molasses Company, and builders, and neither were satisfied with the propeller supplied. The defendants, the Manganese Bronze Company, answered: (1.) that the circumstances under which the propeller was ordered did not bring the case within s. 14, sub-s. 1, of the Sale of Goods Act, 1893; (2.) that in these circumstances the question of merchantability did not arise; (3.) they argued, as the judge found, that the condition about entire satisfaction did not arise where the makers had in all other conditions complied with their contract to manufacture a specified article.

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(1) [With the learned Lord Justice's authority several passages discussing the facts in detail are omitted as not being material for the purposes of a permanent report.—F. P.]

I have carefully considered the evidence and arguments in this case, and state at once the conclusions at which I have arrived. I follow this statement with a summary of the main reasons for my conclusions: (1.) In my opinion the plaintiffs did not expressly or by implication make known to the defendants the particular purpose for which the propeller was required—namely, to work in a particular ship in conjunction with a particular specification of Diesel engine, with particular critical periods. The specification and critical periods were not made known to the defendants. The plaintiffs did not show the defendants that they relied, nor did they in fact rely, on the defendants' skill and judgment on the question whether the propeller, of which the plaintiffs prescribed the leading dimensions, would work suitably in combination with the engines, whose specification was prescribed by the plaintiffs and not made known to the defendants. There was, therefore, no implied condition that the propeller was reasonably fit for the above purpose. (2.) The cause of the noise at low, not at full, speed was some relation between the weight and dimensions of the propeller and the length, breadth and thickness of its blades on the one hand, and the working and impulses of the engines on the other. The defendants were not told anything about the engine conditions; most of the dimensions of the propeller were settled by the plaintiffs without consulting the defendants. Those dimensions left to the judgment of the defendants were, according to normal practice, suited to the prescribed dimensions. The judge does not find any "negligence" in shaping the blades, but merely that the shape and thickness did not suit the engines, on which question the defendants were not consulted and had no information. (3.) The materials and the casting of the propeller, and the workmanship of dimensions unspecified by the plaintiffs, were in accordance with normal practice, and a good delivery under the contract. (4.) Under these circumstances, the question of merchantableness does not arise. (5.) I agree with the judge's result as to "entire satisfaction." I think that under the above findings the question of "entire satisfaction" does not arise. The judge, indeed, finds that without the contrary of the above findings dissatisfaction gives no claim. I do not, however, understand how after altering the first propeller the purchasers can reject it, even if they disapprove of it. (6.) On the above findings, the plaintiffs fail, and it is unnecessary to decide the defendants' appeal as to damages. The plaintiffs' cross-appeal as to damages fails.

I deal first with the question whether there was, in this case, a warranty of fitness for any and what purpose by reason of s. 14, sub-s. 1, of the Sale of Goods Act, 1893. That section reads: "There is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied

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condition that the goods shall be reasonably fit for such purpose." The goods in this case were of a description which it is in the course of the seller's business to supply; the question is, whether, in this case, the buyer (1.) either expressly or by implication made known to the seller the particular purpose for which the goods were required, (2.) so as to show that the buyer relied on the seller's skill and judgment. The buyer may make known to the seller the purpose for which the goods are required, in such circumstances as to show he is acting on his own judgment in what he orders, and is not relying on the seller's judgment. The buyer may consult his own experts, form his own judgment on their reports, and act on it, rejecting the advice of the seller as to variations.

I take the law on the subject from the recent decision of the House of Lords in *Medway Oil and Storage Co.* v. *Silica Gel Corporation.* (1) The relevant passage in the judgment of the House, delivered by Lord Sumner, is reported in the Commercial Cases, but we have seen the full judgment and the record. The House of Lords, affirming the Court of Appeal, held that in the circumstances of that case the buyers of machinery did not rely on the skill and judgment of the seller and bring to his notice their reliance. Lord Sumner examines the true construction of s. 14, sub-s. 1, and states as the judgment of the House certain propositions which are extracted in the report in the Commercial Cases. I read his judgment shortly thus: It must be proved that there was the buyer's reliance on the skill of the seller, and that this reliance was shown to the seller; that is, that as a reasonable man he must have known that the buyer was relying on the seller's skill and judgment and not on his own. These questions are questions of fact, to be answered after considering all the circumstances from the first inception of the transaction to the conclusion of the contract. The questions are questions of degree; in some cases the reliance is obvious, in others doubtful; in others obviously absent. The reliance need not be exclusive; the

(1) 33 Com. Cas. 195.

buyer may also consider advice of his own experts, but the reliance on the seller must be "a substantial and effective inducement," and the seller must be aware of its existence and operation.

These being the matters to be considered, I turn to the facts in this case. [The Lord Justice discussed the details of the orders and continued:] On these facts, and endeavouring to follow the principles laid down by the House of Lords in the *Medway* case (1), I am unable to find that Cammell Lairds relied on the skill and judgment of the Manganese Company and brought their reliance to the attention of the Manganese Company. Cammell Lairds appear to me to have acted on their own judgment after certainly taking the advice of the engine builders and acting on that of Messrs. Kincaid, and probably getting the approval of the owners. They themselves prepare the working drawings on their own judgment and without consulting the Manganese Company. They do not inform the Manganese Company of the difference in the engines or of their respective critical periods. Subject to two matters which I postpone till I have stated the facts of the trials, in my opinion in these circumstances, the warranty of fitness for the particular purpose, I suppose, of being used for two ships, the contracts for building which were not disclosed to the propeller builders, ships fitted with engines, the contracts for which were not disclosed to the propeller builders, does not arise. [The Lord Justice then discussed the details of the trials, and continued:] It is clear that the noise comes from the propeller as revolved by the engine, and the question is whether the defendants have promised that a propeller made to plans prepared by Cammell Lairds, without consultation with the defendants, shall not make a noise when worked by an engine, the particulars and critical period of which the defendants are not told, but which is said to be within the "normal characteristics of a Diesel engine," though apparently "normal characteristics" may cover varieties in critical periods between different normal engines. [The Lord Justice

(1) 33 Com. Cas. 195.

discussed further details of the trials and continued :] The plaintiffs' case was, in the first instance, rested on s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and the plaintiffs (1.) making known to the manufacturer the particular purpose for which the propeller was required, (2.) so as to show the manufacturer that the plaintiffs relied on his skill and judgment. I have already found that the plaintiffs did not fulfil the second condition. I am also of opinion that they did not prove the first condition. Of course they made known that the propellers were required for two steamers, and gave the principal dimensions of the propellers to the manufacturers. But Cammell Lairds never made known the "particular purpose"—namely, that the propellers would be worked by two different engines of different descriptions and critical periods. They did not give the makers the engine specifications ; for instance, the makers were never told of the clause in the Kincaid specification : "Engine to be capable of working regularly at about one-third normal speed," which would be about "dead slow." Whoever inserted that clause in the specification obviously knew something important about the dangerous possibilities in critical periods of the engine he was ordering, but the makers of the propeller were not told of it. The question of knowledge of general purpose, but ignorance of particular purpose, in the case of fitness for general purpose and unfitness for particular purpose, was considered by the Court of Appeal in *Jones* v. *Padgett.* (1) In that case the manufacturer of woollen cloth supplied to a wool merchant indigo blue cloth. The cloth was fit for many purposes, but the purchaser was a tailor who wanted it for club liveries, for which it was unsuitable. The manufacturer did not know of this position of his purchaser, or of his requirements. The Court held that there was no warranty that the goods were fit for the particular purpose of club liveries. In the older case of *Shepherd* v. *Pybus* (2), the sale of a nearly completed barge, it was held that there was no warranty of fitness for a special use of the barge contemplated by the buyer but not communicated to the seller. I accept the statement of the position in Benjamin on Sale, 7th ed., pp. 662 and 663: "where it is part of the contract that the goods shall be made according to a certain plan, or according to a certain style, shape, or form, or of specified materials, the buyer relies upon his own judgment as to the sufficiency of the plan, style, etc., or of the materials for effecting the purpose contemplated. The only liability then of the manufacturer is to execute the work according to the plan, etc., and in a workmanlike manner, and to exercise due care and skill in the selection and testing of the materials, in the absence of an express engagement on his part to produce goods which will be adapted to the buyer's purpose." The statement as to the obligation of skill in choosing materials and providing good workmanship comes from Lord Esher in *Hall* v. *Burke* (1), where he says: "There were two well known kinds of contract—first, a customer might ask a manufacturer to make a machine according to a given plan or according to a plan supplied by the customer; in that case the manufacturer would only have to make the machine according to the plan and in a workmanlike manner." In my opinion this statement provides the answer to questions of some difficulty raised as to why, if the warranty of fitness for particular purpose was excluded, unfitness of material or workmanship for the general purpose of a propeller to be used in a ship was actionable. I think the answer is that besides complying with the buyer's dimensions, the propeller must be generally fit as a propeller. The casting is left to the discretion of the manufacturer, and he would be liable for defects of material or casting. This is academic in the present case, as I agree with the judge that there was not the slightest evidence of defective material. Yet this was Mr. McMenemey's original complaint when, while admitting that as to shape, dimensions and thickness of blades he had no complaint, he said: "The propeller had some physical defects in it that we could not detect, in the nature of the casting, the consistency of the metal." This, the judge finds and I agree, the plaintiffs wholly failed to prove.

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(1) 24 Q. B. D. 650.

(2) 3 M. & G. 868.

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(1) 3 Times L. R. 165.

The next question is whether there were defects in workmanship. Certain dimensions in the working drawing were not specified, such as the thicknesses of blades between the medial specified thickness and the fine edge. Mr. McMenemey originally made no complaint of the thickness of the blades. I think it is clear that if an expert took the Cammell Laird drawing and order and compared them with the finished propeller, he would say the propeller was a good job. Mr. Pike, the experienced manager of Messrs. Stone, well known competitors of the Manganese Bronze Company, compared the propeller with the order and working drawing, and said he would have carried out the order in the same way without the slightest hesitation. Any deviations from the contract dimensions were within reasonable limits of accuracy or tolerances; that is to say, in the judgment of a person who did not know the particular engines with their peculiarities that were to work the propeller, the propeller was a good delivery. Any fault to be found with it arose from its being revolved by special engines producing special vibrations. The shaping of the blades for a propeller to those drawings was normal good workmanship. Indeed, Mr. Pike was examined before Mr. Little had developed for the plaintiffs the attack which the judge found to succeed. I now deal with this.

The pleadings and opening of the case by plaintiffs' counsel and the evidence of their witnesses had made no complaint of the shape or thickness of the propeller blades between the medial line and the edge. The thickness at the medial line was prescribed by Cammell Lairds' working drawing, and was, after allowing for the usual tolerances, substantially followed. The shape and thickness of the blade from medial line to the fine edge was left to the judgment of the manufacturer, following normal practice, and according to the very experienced manager of Messrs. Stone, one of the leading makers of propellers, was quite in order. During the trial Mr. Little took measurements of the blades of the second replace propeller of the *Athelfoam*, which was in Falmouth, and came to the conclusion that the difference between those thicknesses and those of the first propeller of the *Athelfoam*, and the consequent increase in weight, accounted for the noise. He put his measurements pictorially on a plan, showing the changes. I refer to this. Mr. Little did not include on his plan the corresponding thicknesses of the blades of the *Athelbeach* propeller, for she was at sea. When the *Athelbeach* returned to this country after the trial Mr. Wall for the Manganese Company took the measurements and embodied them in the plan. Mr. Little accepted them. Application was made to this Court to admit them as further evidence. It appeared to us that they might be very relevant, and, in view of the late stage of the case at which Mr. Little's theory and evidence were given, and the impossibility then of getting at the *Athelbeach*, that they should be admitted on the authority of the well known case of *H. M. S. Hawke.* (1) The plans appear to show that comparing the first *Athelfoam* propeller (No. 1) with that of the *Athelbeach* (No. 2), No. 2 is heavier and thicker than No. 1 at the 2 ft. and 3 ft. radii, but thinner and lighter than No. 1 for the rest of the blades. It also appears that No. 2 makes no noise with the *Athelfoam* engine, but does make a decided hum with the different engine of the *Athelbeach*. Further, while the first replace propeller makes a considerable noise, and the *Athelbeach* propeller with the *Athelfoam* engine makes none, there is only 28 lbs. difference in weight between them in a propeller weighing nearly 7 tons. I have carefully considered the diagrams and measurements, and have come to the conclusion that while it may be that the different weights and thicknesses account for the noise, there is no ground for finding the propeller dimensions of the *Athelfoam* No. 1 a breach of contract, when they in themselves comply with Cammell Lairds' drawings and with normal practice, and only make a noise, not at full speed, their main work, but at lesser speeds when worked by engines chosen by Cammell Lairds, whose peculiarities were never communicated

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(1) [1913] P. 214, 238.

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to the manufacturer. It was said that these engines were normal; it may be that they were within the variations that may be expected from a Diesel engine. But very slight changes appear to cause noisy vibrations as opposed to quietness; the *Athelbeach* propeller hums with the Kincaid engine at slow speeds, but is quiet with the North Eastern engine at the same speeds. Both are quiet at full speed. There is no suggestion that the thicknesses of the *Athelfoam* propeller depart from good engineering practice. The learned judge expressly finds that the blades were "not negligently shaped," but he finds that the shape was the cause of the noise. In my view it was not merely the shape of the propeller but that shape combined with the peculiar qualities of the particular Diesel engine vibrating the propeller which made the noise. The manufacturers were no more responsible for the result of this combination then they were for the speed to result from the combination. They were not told of the peculiar quality of the engine or its critical periods, and did not contract that the combination of Cammell Lairds' engine and their propeller, which did work satisfactorily at full speed, would also work satisfactorily at some lower speed.

The judge's view is expressed as follows: "Mr. Miller submits, and I think that he is right, that if he satisfies me that the defendants contracted to supply a propeller which was fit for its purpose"—I have found that they did not so contract—"and so as not to make such a noise as to be useless on board the ship, then he has not got to show more than that it made such a noise, and that it was unfit, and that if it is unfit, for some unknown cause, by some latent defect which is obscure, that is not his affair, but that it is the suppliers who must take the risk of occasionally there being one of these curiously noisy propellers, and they must supply another one." This overlooks the fact that it is the engine which makes the propeller vibrate, and the manufacturer is not responsible for the engine of which he was not made cognizant. The judge continues: "I think that that is right, but I am not left in that doubt. In my own mind I have no doubt of what was the matter. Questions were discussed as to the composition of the metal itself"—This was Cammell Laird & Co.'s original case—"I think that that has really fallen to the ground. I am satisfied that the metal in the two propellers was in all material respects the same, and I do not think that anything here was due to defects in casting, or to little differences in elasticity of the metals, or anything of that kind. I think that the root cause was that the blades of the first *Athelfoam* propeller, and, to some extent, of the second *Athelfoam* propeller, were not properly shaped for their purpose"—But that purpose is for working with an engine of which the manufacturers were not informed—"When I say that they were not properly shaped, I do not mean that they were negligently shaped, but that the shape of the earlier propeller was the cause why the tendency to make a noise, which is always there, and was, perhaps, very likely to be easily put in operation under the conditions that here existed, was the decisive factor. The second *Athelfoam* propeller was slightly, although not a great deal, heavier than the first *Athelfoam* propeller."

If it is necessary to find the cause of the noise, I think it was probably the combination of a propeller made to good engineering practice and of suitable material, and in accord with Cammell Lairds' drawings, with an engine which by its critical periods was not suitable for that propeller. Mr. Raeburn for the manufacturers assigned the noise to the combination of three causes, for none of which was he responsible: first, the nature and critical periods of the engine; secondly, the low pitch ratio; thirdly, the bad fitting by Cammell Lairds of the propeller to the shaft, including three changes of key. As to this last head, at least two days were taken in the Court below, and two days in this Court, in hearing numerous witnesses contradicting each other as to the existence and meaning of certain marks on the keys and key-ways. The learned judge had the advantage of a view, assisted by a witness of each side, pointing out and explaining the marks. He came to the conclusion that the propeller was well fitted to the shaft. This Court cannot interfere with this finding, particularly as it was not asked to examine the propeller on its own account, which indeed would be rather difficult for a Court of three judges. As to the second head, the low pitch ratio (.68), it is undoubtedly low, though not unheard of, and I think made the equilibrium or balance of the propeller and engine combined unstable. I should not, however, call it by itself a cause of the noise. As to the first head, I should not find the engine by itself the cause, for with the *Athelbeach* propeller the combination was not noisy. Both the *Athelfoam* propeller No. 1 and the *Athelbeach* propeller worked all right with the *Athelfoam* engine at full speed revolutions. I should be prepared to find that the cause of the noise was that Cammell Lairds' engines and the manganese propeller were not suited to work together at slow speed revolutions. But the defendants had nothing to do with the choice of the engines and were not informed of their critical periods or other characteristics. I do not think it is sufficient to say that the *Athelbeach* engine was a normal Diesel engine, for there is obviously a range of normality with different critical periods. The *Athelbeach* propeller makes a decided hum with the Kincaid engine but is silent with the *Athelfoam* engine at the same speeds. Yet both engines are supposed to be normal. Unfortunately the *Athelfoam* propeller was not tried on the *Athelbeach*.

There remains the question of merchantability under s. 14, sub-s. 2, of the Act. I do not repeat the previous discussion, but in my opinion the propeller was merchantable as a propeller; it was in accordance with Cammell Lairds' drawings, sound in material, and as to the other dimensions and workmanship, in accordance with normal practice. In combination with Cammell Lairds' engines it was not merchantable, but the Manganese Company were not responsible for Cammell Lairds' engine, and had not contracted that the combination would work, or have any particular speed.

The last question of liability was that the plaintiffs contended that under the contract the propeller was "to be to the entire satisfaction of the owners' representative and ourselves," and it was not, so they were entitled to reject it.

The judge below has repelled this contention. His reasons are given in his judgment, and I do not repeat them. In my view, where a propeller is to be made to the buyer's specification, is so made, is of good material and workmanship, it is in accordance with contract, and the buyer cannot say: "Even so, I reject it, for I am not satisfied with it." What he is not satisfied with here is the combination of the defendants' propeller with the plaintiffs' engine, for which the maker of the propeller is not responsible. The only cases to which we were referred were discussions of the difference between reasonable and bona fide dissatisfaction. I think "entire satisfaction" is "bona fide," and need not be reasonable. Counsel were not acquainted with any case in which a thing made according to contract was held subject to rejection because the buyer was dissatisfied with it. I think curious questions as to damages might result in such a case. But I do not understand how, having altered the first propeller as they did, the buyers can reject it even if they disapprove of it.

I have now given the reasons for the conclusions I stated early in my judgment, and it follows that, in my opinion, the appeal should be allowed and judgment entered for the defendants with costs. But, as I think they failed on the issue as to bad fitting, they must pay the costs of that issue, which I should fix as two days' costs of the hearing in the Court below, with a proportionate allowance for costs of witnesses, and two days' costs of the hearing in this Court, with a set-off of costs. The defendants must have the costs of the cross-appeal. Coming to this conclusion, I have not dealt in detail with the appeal and cross-appeal as to damages. But I agree with the judge in his decision that interest on payment of instalments of purchase price after the contract date is too remote, the terms of the contract never having been brought to the notice of the seller. The appeal of the seller raises difficult questions, for counsel could refer us to no case where a buyer had been given the costs of examination of the article bought in order to see whether it complied with the contract, especially where prolonged examination had resulted because the buyer originally thought that something else than the work of the seller, in this case the Oertz rudder, was in fault.

I should like to say that, in my opinion, there is room for a good deal of further investigation as to the relation of Diesel engines and their critical periods to propellers. My experience in propeller cases (and I have had a good deal) has generally been that the views of experts are rather empirical, that is, they are inclined to say: "The results of this propeller with this engine are good," or bad, "but I cannot tell you why." I doubt in the present case whether any expert, looking at the two propellers, *Athelfoam* No. 1 and *Athelbeach*, before they were tried on the ship, could have said whether either, and which, of them was a good delivery, and, if there was a difference, explain the cause of the difference.

LAWRENCE L.J. In order to determine the extent of the appellants' liability under their contract with the respondents it is essential, in the first place, to arrive at a just appreciation of the general nature of that contract.

The appellants are the well known propeller manufacturers specializing in the manufacture of bronze propellers made of a high-tension bronze alloy known as Parsons' manganese bronze. In the course of their business they undertake not only to cast bronze propellers according to designs and dimensions furnished to them by shipbuilders or shipowners but also to design and cast bronze propellers suitable for any given ship already built or about to be built. It is obvious that there is a sharp distinction between the liability undertaken by them according to whether the contract is of the former or of the latter type. Broadly speaking the distinction is that under a contract of the former type their obligation is confined to making a propeller in all respects according to the design and dimensions with which they have been furnished, and they are not concerned to see that the propeller is suitable for the particular vessel or for the particular engines for which it is intended, whilst under a contract of the latter type their obligation is wider and extends to making a propeller which is in all respects suitable for the particular vessel and engines for which it is required. Before entering into a contract of the latter type the appellants naturally require to know a great many particulars concerning the ship and its engines, a list of which particulars is contained in their illustrated catalogue on p. 162 under no less than twenty headings. These particulars include, as might be expected, a description and size of the engines, details as to the manner in which they work, dimensions of the ship, its mean summer draught when loaded, and numerous other matters. None of this information is furnished or required when the contract is to make a propeller to a specified design, as in such a case the shipbuilder or shipowner undertakes the responsibility of seeing that the propeller which he orders is suitable for his ship and its engines. In both types of contract it is not unusual for the appellants to guarantee the propeller manufactured by them against defective materials and workmanship for a period of six months after the vessel to which it has been fitted has been handed over to the owner.

With these preliminary observations I turn to the facts in the present case. In the month of January, 1930, the respondents entered into a contract with the United Molasses Company, Ld., to build for them a single screw tank vessel which was afterwards called the *Athelfoam*. Under this contract the *Athelfoam* was to be fitted with main propelling Diesel engines of "North Eastern" (Werkspoor) type, which engines, together with all necessary boilers, machinery, outfit, equipments and appurtenances, were to be constructed by the North Eastern Marine Engineering Company, Ld., of Wallsend-on-Tyne. The contract further provided that the propeller to be fitted to the *Athelfoam* should be a solid bronze four-bladed propeller of suitable diameter and pitch, to be polished and edges to be brought up fine. After consultation with the North Eastern Marine Engineering Company as to the proper diameter and pitch of the propeller the respondents designed a four-bladed propeller which they considered would suit the *Athelfoam*, and entered into a contract with the appellants for the construction of a bronze propeller in accordance with that design. The precise date of this contract is uncertain, but its terms (so far as is relevant to this case) are contained in the written order given to the appellants dated May 19, 1930. It is unnecessary to set out this order in full, suffice it to say that it included the following stipulations—namely, that the propeller was to be constructed of special Parsons' manganese bronze; that the edges were to be brought up to fine lines; that the particulars of its construction were contained in the print of the working drawing which had been supplied to the appellants; that it was to be guaranteed against defective materials and workmanship for a period of six calendar months after the handing over of the vessel to the owners; and that it was to be to the entire satisfaction of the owners' representative and the respondents. Shortly after the date of this order the respondents supplied the appellants with an amended print of the working drawing of the propeller and stated that the appellants were required to work to that drawing. In view of the stipulation as to the six months' guarantee the appellants, before accepting the order, requested the respondents to furnish them with the maximum indicated horse-power with corresponding revolutions in order to enable them to check the sections and see whether the proposed propeller blades would stand the strain to which they were going to be subjected. In response to this request the respondents furnished the appellants with the desired information, and asked for and obtained the appellants' approval of the proposed scantlings shown on the working drawing on the basis of the stated horse-power and revolutions. The appellants eventually accepted the order and proceeded with the manufacture of the propeller.

Pausing there, it is to be noted that the respondents did not furnish the appellants with any information either as to the dimensions or draught of the vessel to which the propeller was to be fitted, or as to the engines and machinery with which that vessel was going to be equipped, or give them any particulars which would enable them to judge whether the propeller which they were required to make would be suitable for the particular vessel for which it was required. The manufacture of the propeller having been completed, the appellants on July 5, 1930, delivered it to the respondents. Before its delivery the propeller had been examined and tested by one of Lloyd's surveyors and certified by him to be satisfactory. The evidence given at the trial established beyond question that the propeller complied in every respect with the working drawing to which the appellants were required to work. Mr. McMenemey, the respondents' engineering manager, admitted in the witness box that this was so and that he could not detect any defect in material or workmanship. Mr. Pike, the works manager of Messrs. J. Stone & Co., Ld., of Charlton (who, with the appellants, were stated to rank as the two most prominent propeller specialists in the country), after having examined the propeller and compared it with the order and working drawing, stated that he considered it an extraordinarily good example in respect of workmanship, finish and adherence to dimensions, and that if the respondents' order had been given to his firm and the propeller had come before him for examination as manager he would have passed it without hesitation. The respondents fitted the propeller to the *Athelfoam* and it was then found that at certain revolutions it made such a loud noise that Lloyd's refused to class the *Athelfoam* 100 A 1, that classification being one of the conditions of the contract between the respondents and the owners. Thereupon the respondents made certain experiments with a view to seeing whether this noise could be silenced. They first drilled a one-inch diameter hole in the centre line of each blade 9 inches from the tip, then they changed the intermediate shaft and finally they shortened the blades by cutting off 2 inches from their tips. None of these expedients proved successful in stopping the noise. The respondents then fitted to the *Athelfoam* another propeller which had been manufactured by the appellants to the same design and had been fitted to a vessel called the *Athelbeach*, and on that propeller proving silent when fitted to the *Athelfoam* they procured the appellants to manufacture a new propeller for the *Athelfoam* according to the original design. This new propeller when fitted to the *Athelfoam* also proved noisy, though to a lesser degree than the original propeller, and the respondents procured the appellants to manufacture a third propeller, still adhering to the same design. This third propeller, when tried on the *Athelfoam*, proved to be silent, and has been accepted by the respondents.

The cause of the sonority of the original propeller has puzzled all the experts engaged in investigating the subject. The appellants' and respondents' engineers at first thought that the special kind of rudder which had been fitted to the *Athelfoam* was the cause of the noise, but after the experiment with the *Athelbeach* propeller they realized that this was not the true explanation. The respondents then attributed the noise to some flaw in the metal or casting of the propeller, but have wholly failed to prove that any such flaw in fact existed. The appellants, on the other hand, attributed the noise to some defect in the fixing of the propeller to the shaft, but the learned judge, after a careful investigation and an inspection of the propeller (especially of its keyway in the boss), has found that the propeller was properly fixed and the appellants have shown no valid ground for disturbing that finding.

After the trial had been in progress for some days the respondents for the first time started the theory that the noise was due to the propeller blades not being thick enough between their medial lines and leading edges. Mr. Little, taking advantage of one of the week-end adjournments of the trial, made certain measurements which enabled him to prepare a diagram showing the differences in the thickness of the leading edges of the propeller blades of the original and of the first and second replace propellers. This diagram shows that the leading edges of the blades of the first replace propeller were slightly thicker than those of the original propeller, and that the leading edges of some of the blades of the second replace propeller were slightly thicker than those of the first replace propeller. The learned judge attached great importance to this evidence, and arrived at the conclusion that the true explanation of the noise made by the original propeller was that its blades between their medial lines and their leading edges had been made too thin. The learned judge arrived at this conclusion without having any evidence before him as to the thickness of the leading edges of the *Athelbeach* propeller which, as before stated, made no noise when fitted to the *Athelfoam.* At the time when the evidence as to the thickness of the leading edges of the blades of the three *Athelfoam* propellers was produced to the Court the *Athelbeach* was at sea, and it was impossible for the appellants to procure the measurements of the leading edges of her propeller blades. In view of this fact and of the fact that the theory that the want of thickness of the leading edges of the original propeller blades was the cause of the noise had only been put forward after the *Athelbeach* had gone to sea, this Court gave the appellants leave to put in evidence as to the thickness of the leading edges of the *Athelbeach* propeller blades, that vessel having returned from her voyage after the judgment in this action had been delivered. The respondents, although resisting the application for the admission of this fresh evidence, did not object, if it were admitted, to its being given by affidavit and, as they did not dispute the substantial accuracy of the measurements deposed to in the affidavit, they stated to this Court that they did not desire to cross-examine the deponent but would content themselves with putting in an affidavit in answer by their expert.

The fresh evidence before this Court establishes that the difference in thickness between the leading edges of the *Athelbeach* propeller and the leading edges of the original and first replace propellers is very small. The *Athelbeach* propeller is only 102 lbs. heavier than the original *Athelfoam* propeller and 28 lbs. heavier than the first replace propeller, and even if this additional weight were in fact distributed between the lower portions of the leading edges of the four propeller blades of the *Athelbeach* propeller (which on the evidence is by no means clear), this would not make the blades of the *Athelbeach* propeller substantially stiffer or substantially less susceptible to vibration considering that the weight of each propeller is nearly 7 tons. Moreover, the upper part of the blades of the original propeller have been made substantially lighter by the boring of the holes and by the shortening of the tips, and yet the noise persists. If the fresh evidence had been before the learned judge at the trial I very much doubt whether he would have attributed the noise solely to the want of thickness of the leading edges of the original *Athelfoam* propeller blades. Be that as it may, however, the evidence clearly establishes that the original *Athelfoam* propeller was manufactured by the appellants in strict accordance with the working drawing to which they were required to work, and that there was no deviation from the measurements or dimensions shown on that drawing going beyond the margin of tolerance acknowledged to be permissible in the manufacture of such an article. The working drawing specifies the thickness of the blades along their medial lines and also the thickness of the leading edges at the base of the blades; further, the contract provides that the edges were to be brought to fine lines. The appellants complied in all respects with their instructions and tapered off each blade from the specified thickness at the medial line to the leading edges in the usual and proper manner. The learned judge held that they were not negligent in the way they performed this task; therefore, if the leading edges were too thin to suit the engines of the *Athelfoam*, that was not the appellants' fault but the fault of the design to which they were required to work. It is a great pity that the respondents did not try the original *Athelfoam* propeller on the *Athelbeach*. In the absence of such a trial the net result of the evidence is that the original *Athelfoam* propeller, although made in accordance with the specification, is not suited to work in combination with the particular engines and machinery installed in the *Athelfoam*. The fact that the sound produced by the vibrations of the propeller is at its loudest at about 83 revolutions (which is one of the minor criticals of the *Athelfoam's* engines) seems to me strongly to confirm the view expressed by the respondents' own marine architect, Mr. Sutton, in his report after the third trial run of the *Athelfoam* dated December 16, 1930, that the propeller was getting a series of periodic impulses from the engines, which impulses at certain revolutions synchronized with the period of vibration of the propeller in such a way as to produce a ringing note. Moreover, the fact that out of four propellers made to the same design, two were noisy and two were silent at certain revolutions when operated by the particular engines installed in the *Athelfoam*, in my opinion shows that the design (whether owing to the low pitch ratio or to the insufficient thickness of blades or for some other reason) was such that there was a substantial risk that a propeller manufactured according to it when operated by those particular engines would prove to be noisy.

The question in this case is who, in these circumstances, is liable to bear the loss owing to the original propeller having proved to be unduly noisy: the shipbuilders who designed the propeller and selected the engines and machinery by which it was to be operated or the manufacturer of the propeller who complied in all respects with his instructions and neither had a voice in designing the propeller nor any information as to the particular engines and machinery by which it was going to be operated?

On September 14, 1931, the respondents commenced this action against the appellants claiming damages for breach of contract, alleging in their points of claim that the original *Athelfoam* propeller (1.) was not reasonably fit for its purpose, (2.) was not merchantable, and (3.) was not satisfactory to the owners' representative or to the respondents.

The respondents' first head of complaint is based on sub-s. 1 of s. 14 of the Sale of Goods Act, 1893, and the question to be determined is whether that sub-section applies to the facts of the present case. In order to bring the case under that sub-section the respondents must prove that they expressly or by implication made known to the appellants (*a*) the particular purpose for which the propeller was required, (*b*) so as to show that they relied on the appellants' skill and judgment. In the circumstances of the present case I am of opinion that the particular purpose for which the propeller was required within the meaning of the sub-section was that it should be fitted to a particular vessel (the *Athelfoam*), which the respondents had contracted to build for the United Molasses Company, and should work in combination with the particular Diesel engines and auxiliary machinery manufactured and supplied by the North Eastern Marine Engineering Company with which that vessel was to be equipped. If that be the right view it is plain that the respondents did not comply with the essential condition of making the particular purpose for which the propeller was required known to the appellants. Of course the appellants are well aware that every propeller manufactured by them for a customer is required for the purpose of being fitted to some vessel, and it is obvious that in the present case they knew that the propeller in question was required for the purpose of being fitted to a vessel which the respondents were building but, in my opinion, that was knowledge of the general and not the particular purpose for which the respondents required the propeller. I cannot readily conceive that the appellants would, in the circumstances of this case, have consented to the insertion in their contract of an express condition that the propeller which they were instructed to manufacture should be suitable for the purpose of being fitted to the *Athelfoam* without knowing anything about that vessel or about the engines and machinery with which it was going to be equipped. In arriving at this conclusion I have not overlooked the finding of the learned judge that the appellants had from outside sources become aware of the fact that the vessel for which the propeller was required was going to be equipped with Diesel engines, but that fact was not made known to them by the respondents, nor would that general knowledge enable them to judge whether the propeller would be suitable to work in combination with

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the particular Diesel engines and machinery which were going to be installed in that vessel.

But even if (contrary to my opinion) the true view be that, by the mere fact of giving the order, the respondents did make known to the appellants the particular purpose for which the propeller was required within the meaning of the sub-section, I am of opinion that they did not do so in such a manner as to show that they relied on the appellants' skill and judgment within the meaning of the sub-section. If the appellants had undertaken to design and supply a propeller for a particular vessel equipped with particular engines and machinery—in other words, if the appellants had entered into a contract of the second type referred to at the commencement of my judgment the sub-section would, no doubt, have applied, but that is not the present case. It is plain that the contract which the appellants entered into is one of the first type of contracts referred to by me—namely, a contract to manufacture a propeller according to a specific design and specific dimensions without reference to the particular purpose for which it was required. The respondents no doubt relied upon the appellants' skill to manufacture a propeller according to their design in a proper and workmanlike manner, but not upon their skill and judgment that the propeller when manufactured according to that design would be suitable for the particular purpose for which it was required. The skill and judgment referred to in the sub-section must, in my opinion, in the circumstances of the present case, mean skill and judgment in making a propeller that would be suitable to be fitted to the *Athelfoam*, and one which would work in combination with the particular engines and machinery with which that vessel was going to be equipped. If the respondents had intended to rely upon the appellants' skill and judgment as to the suitability of the propeller for that particular purpose, it is inconceivable that they would not have consulted them as to the design and dimensions of the propeller, and would not have furnished them with the necessary information as to the vessel and engines so as to give them some chance of exercising that skill and judgment. On the evidence in this case it appears to me to be fairly plain that, as regards the suitability of the propeller for the particular purpose for which it was required, the respondents did not rely upon the appellants' skill and judgment, but, on the contrary, relied upon their own and to some extent upon the North Eastern Marine Engineering Company's skill and judgment, contenting themselves with a six months' guarantee by the appellants against defective material and workmanship. As Lord Sumner pointed out in the case of *Medway Oil and Storage Co.* v. *Silica Gel Corporation* (1), the warranty mentioned in s. 14, sub-s. 1, of the Act, although no doubt an implied one, is still contractual, and in the circumstances of the present case I do not suppose for one moment that the appellants consented to the liability which the sub-section would involve in case the propeller should not happen to suit the particular vessel to which the respondents intended to fit it or the particular engines with which the respondents intended to equip that vessel.

As, in my opinion, the respondents did not in fact rely upon the appellants' skill and judgment within the meaning of the sub-section, it follows that even if the true view be that they did make known to the appellants the particular purpose for which the propeller was required, they did not do so in such a manner as to show that they relied upon their skill and judgment to make a propeller suitable for the *Athelfoam* and its engines.

Considerable stress was laid by the respondents on the fact that the *Athelfoam* is a "normal" vessel, and that the Diesel engines with which that vessel is equipped are "normal" reciprocating engines which pass smoothly through their criticals, and it was contended that this fact brought the case within the purview of the sub-section, because it must be assumed from the terms of the contract that the respondents made known to the appellants that the propeller was required for a

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(1) 33 Com. Cas. 195, 196.

"normal" ship and equipped with "normal" engines and, therefore, the respondents made known to the appellants the particular purpose so as to show that they relied upon the skill and judgment of the appellants, presumably, to manufacture a propeller reasonably fit for any "normal" ship and any "normal" engines. In my opinion that contention is not well-founded. In the first instance, it is not easy to appreciate what is meant by a normal ship and by normal engines in this connection. There are many types of ships and many types of engines which vary from each other without being abnormal. A propeller which would be suitable for one ship and would combine with one set of engines might be totally unsuitable for another ship and another set of engines though both the ships and both the engines were normal. Moreover, every normal reciprocating engine has its own particular criticals. No two engines, even although they are of the same type and made of identical parts, will give precisely the same impulses or keep in step with one another. The present case affords an example of a propeller manufactured according to a specified design being highly susceptible to sound producing vibrations at certain revolutions when operated by a particular Diesel engine. Apparently the slightest variation (although well within the margin of tolerance) in the dimensions of any propeller manufactured in accordance with that design, when operated by the particular engines installed in the *Athelfoam*, may cause that propeller at certain revolutions to become sonorific. In these circumstances it would, in my opinion, be unreasonable to hold that the appellants had, by agreeing to manufacture a propeller according to that design, impliedly undertaken to make a propeller that would suit any ship and engine and machinery of which it could be said that they were not abnormal.

The following passage in Benjamin on Sales, 7th ed., p. 662, in my opinion correctly states the law on this branch of the case: "But where it is part of the contract that the goods shall be made according to a certain plan, or according to a certain style, shape, or form, or of specified materials, the buyer relies upon his own judgment as to the sufficiency of the plan, style, etc., or of the materials for effecting the purpose contemplated. The only liability then of the manufacturer is to execute the work according to the plan, etc., and in a workmanlike manner, and to exercise due care and skill in the selection and testing of the materials, in the absence of an express engagement on his part to produce goods which will be adapted to the buyer's purpose."

In the result, for the reasons stated, I am of opinion that no such implied condition as is mentioned in sub-s. 1 of s. 14 of the Act ought to be imported into the contract in the present case, and that the respondents' claim founded upon an alleged breach of such an implied condition fails.

The respondents' next head of complaint is based on sub-s. 2 of s. 14 of the Act, which so far as material provides that "where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality." The learned judge did not deal with the respondents' contention that the propeller in question was not of merchantable quality beyond stating that that question did not arise in view of his decision on the main point, and in this Court very little argument was addressed to us in support of it. In my opinion it is open to serious doubt whether the propeller in question was bought "by description" within the meaning of this subsection, but, whether that be so or not, in my judgment the respondents have failed to prove that the propeller in question was not of merchantable quality. The evidence only goes to prove that it was unsuitable for the engines of the *Athelfoam*, but that fact by no means establishes that it was not merchantable. The propeller was not tried in any other ship and, in my opinion, no inference can properly be drawn from the evidence given in this case that the propeller would not have worked well and noiselessly in other ships, especially in ships equipped with engines of a different type from those in the *Athelfoam*.

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There remains the respondents' contention that the propeller was not, in the words of the contract, "to the entire satisfaction of the owners' representative or ourselves." The learned judge decided that this term of the contract did not entitle the respondents to reject the propeller if (as, in my opinion, was the case) the appellants had manufactured it in strict accordance with the contract. In my opinion that decision is right. Admittedly a reasonable construction must be placed upon the stipulation in question. It would be absurd to suppose that the parties had intended that the respondents should be at liberty to reject the propeller after it had been made in all respects according to their specification because, for instance, its pitch ratio proved to be too low or because its diameter proved too large for the aperture which had been provided for it. In a contract to manufacture an article according to a specification and working drawing supplied to the manufacturer to the satisfaction of the person ordering it (such as the contract in the present case), the satisfaction of the person ordering the article must, in my opinion, be limited to satisfaction with something which under the contract the manufacturer has bound himself to do. If I am right on the appellants' main contention that there is no implied condition in the contract that the propeller should be reasonably fit for the particular purpose for which it was required, I am of opinion that it is not open to the respondents to reject a propeller made in accordance with that contract because they or the owners are not satisfied with it on the ground that it happens to be unsuitable for the *Athelfoam* and its engines.

No case has been cited to us, and I know of none, in which in a contract such as we have here it has been held that a stipulation in the terms of the one now under consideration has entitled the party to be satisfied to reject the article manufactured where his dissatisfaction is due to some defect for which the manufacturer is in no way responsible. The case of *Andrews* v. *Belfield* (1) is distinguishable on the facts, as there the coachbuilder undertook to build a carriage so

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(1) 2 C. B. (N. S.) 779.

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as to meet the customer's approval not only on the score of workmanship but also that of convenience and taste. In that case the coachbuilder took the chance of satisfying the taste of his customer, and it was held that the customer might disapprove of the carriage when it was built if he bona fide did not like it. The contract there was fundamentally different from the contract in the present case; here the appellants were strictly tied down and required to work to a specified design, and the decision in *Andrews* v. *Belfield* (1) does not, in my opinion, support the respondents' case.

It follows, from what I have said, that in my opinion no question of damages arises and, therefore, I do not propose to express any opinion upon the various questions which arise on the appeal and cross-appeal on that subject.

In my judgment the appeal should be allowed and the cross-appeal should be dismissed. I agree with the order as to costs suggested by Scrutton L.J.

Greer L.J. This is an appeal by the defendants from the judgment of Roche J., whereby he decided that the plaintiffs were entitled to damages in respect of breaches of a contract for the supply by the defendants to the plaintiffs of a bronze propeller and gave certain directions with regard to the damages recoverable.

The plaintiffs (respondents to this appeal) are the well known firm of shipbuilders whose shipbuilding yard is on the Cheshire side of the River Mersey. The defendants (the appellants) are a well known firm of bronze propeller makers whose foundry is at Millwall.

There is a cross-appeal in which the plaintiffs complain that the learned judge has wrongly excluded from the damages they can recover an item for interest claimed by para. 9 of their amended points of claim.

The defendants appeal not merely on the question of liability but also on the learned judge's directions as to damages.

(1) 2 C. B. (N. S.) 779.

The plaintiffs' claim was based on the breach (*a*) of an express term in the contract, (*b*) of an implied warranty of fitness for the purpose for which the propeller was supplied arising by virtue of s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and (*c*) of an implied warranty of merchantability arising by virtue of sub-s. 2 of the same section. Broadly speaking, the defence to (*a*) was that the facts proved did not show any breach by the defendants of the express term when rightly construed, and as to (*b*) and (*c*), that upon the proved facts there were no such implied warranties as alleged, and, alternatively, that if there were, no breach was proved. They also contended that if there was any breach the damages claimed were too remote.

The contract was made by a series of letters that passed between the parties, and though it is a little difficult to point to the exact date at which the contract should be deemed to have been finally concluded, there is no dispute as to what its material terms were as finally agreed between the parties.

I think the most convenient course for me to adopt in giving my judgment is to state my conclusions first, and then state with such detail as may be necessary the reasons, whether of fact or law, that have led me to arrive at these conclusions.

(1.) It is common ground that it was a term of the contract that the propeller to be supplied by the defendants was to be to the " entire satisfaction " of the owners for whom it was being built by the plaintiffs, and of the plaintiffs. In my judgment neither the propeller that was first delivered nor the first replace propeller was one which satisfied the owners or the plaintiffs within the meaning of the contract.

(2.) In my judgment the plaintiffs in part expressly and in part by implication made known to the defendants the particular purpose for which the propeller was required, so as to show that they relied on the sellers' skill and judgment; the propeller was of a description which it was in the course of the sellers' business to supply, and accordingly there was an implied condition in the contract that the goods should

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be reasonably fit for such purpose. In my judgment the defendants committed a breach of this implied condition.

(3.) In my judgment there was no evidence to justify a finding that the propeller was not merchantable under its description.

I think the learned judge's direction with regard to the damages was in substance right, though I think it ought to be worded a little differently.

(1.) With regard to the express term, there is no doubt whatever that neither the Molasses Company for whom the ship was being built, nor the plaintiffs, were satisfied with either the first or the second propeller. The question to be answered on this part of the case is whether the defendants' failure to satisfy them in relation to the noise made by the propeller was a breach of the express term in the contract. It is, of course, obvious that the defendants knew that the builders of ship No. 972 were building it for some shipowner. I think, as the learned judge thought, that before the contract was concluded they knew in all probability that the Molasses Company was the owner for whom the ship was being built. The first request for tender is headed : "Engines No. 972," and concludes with the words, "Repeat for Engines No. 973," and the order which was accepted, with one or two immaterial agreed modifications, is headed : "Job. Engines No. 972." After describing the propeller and referring to the plan, the order continues : "To be guaranteed against defective material and workmanship for a period of six calendar months after handing over of vessel to owners. To be to the entire satisfaction of the owners' representative and ourselves." I cannot read this as meaning anything except that the propeller, in addition to being made to the specified dimensions, and as otherwise described in the documents, should be : (*a*) guaranteed against defective material and workmanship for six months after handing over, and (*b*) to the entire satisfaction of the owners' representative and the buyers. I cannot read this, as the learned judge has read it, as merely relating to the satisfaction of the owners and the builders with reference to the dimensions and the description stated in the order. I think, in effect, the builders are saying to the suppliers: "We are building this vessel for a customer. We are ordering a propeller from you to do the work of a propeller on ship No. 972 which we are in course of building under contract with our customer. We want you to make a propeller according to certain dimensions indicated on the plan, but everything except what is stated in the contract is necessarily to be left to your skill and judgment, and we require you to complete the job in accordance with the measurements we have given you, but, in any event, so that it will satisfy the owner that it is reasonably fit for the work of a propeller on the ship which we are building for him." This is not a case in which everything in respect of the propeller was specified in the contract. The composition of the metal, the method of manufacture, the nature of the casting, and the distribution of the weight are not specified. In addition to that, the shipowner who is to be satisfied is not a party to the contract. He may not know anything about the wording of the contract between the plaintiffs and the defendants, and the plaintiffs are saying to the defendants: "Not only must you supply me with this propeller in accordance with the measurements which I give you, but you must undertake that the propeller that you make in accordance with those measurements shall satisfy a third party—namely, the owner for whom I am building this ship." There may be some deficiency in my mental machinery which disables me from seeing that there is in this case any answer to the plaintiffs' claim for breach of the express term of the contract.

Inasmuch as the judge in the Court below and my two colleagues differ with me upon this part of the case, it is necessary that I should deal with the other parts with which I would not have dealt if I were merely deciding this case by myself.

The propeller that they first supplied was one which did not, in fact, satisfy either the plaintiffs or the owners' representative, or, if it is necessary to go beyond the owners' representative, the owners themselves. This was, in my judgment, a clear breach of contract, and the defendants are responsible for such damages as are recoverable in law as damages occasioned by the breach. No authority is required for the proposition that the words of an agreement fall to be interpreted according to their natural meaning. But if authority be needed for the view that an agreement that goods when delivered are to be to the satisfaction of the purchaser justifies rejection if the goods when delivered are not to his satisfaction, such authority is to be found in the two cases referred to by the learned judge: *Repetto* v. *Friary Steamship Co., Ld.* (1) and *Haegerstrand* v. *Anne Thomas Steamship Co., Ld.* (2) The true interpretation of such words seems to me to be the same whether they appear in the contract for the purpose of determining whether the contract of sale has become effective, or whether they appear in a contract for the purpose of determining whether the contract has been performed. Similar words were construed by this Court in relation to the performance or non-performance of a concluded contract in the at present unreported case of *Underfeed Stoker Co., Ld.* v. *Vickers Boiler Co., Ld.*, in which we followed the decisions in *Repetto* v. *Friary Steamship Co., Ld.* (1) and *Haegerstrand* v. *Anne Thomas Steamship Co., Ld.* (2)

The learned judge has found as a fact that the objectionable noise made by the first and second propellers was not due to bad fitting on the part of the shipbuilders. He had before him several reputable witnesses who saw the fitting of the propeller when it was originally fitted, who saw the condition of the taper and the keyway when the propeller was first moved from the shaft, and were then able to say whether the fit had been a good one or not, and who positively asserted that it was a good fit; see especially the evidence of Mr. McMenemey, Mr. Milton, a Lloyd's surveyor, and Mr. Woodward, whose special duty it was to represent the owners and see that the work of fitting was properly done. In addition to these the learned judge had the evidence of the experts who were present at the various tests, who said it was quite easy to diagnose the noise caused by the bad fitting of a propeller, and the noise made by this propeller did not cause any one to suspect that the noise was due to imperfect fitting of the propeller. Further, the learned judge saw the condition of both the cone and the keyway of the propeller eighteen months or more after it had been taken off, in the presence of experts on both sides, and then came to the conclusion that there was nothing in the appearance of the propeller at the time he saw it to cause him to doubt the evidence that had been given by the plaintiffs' witnesses as to its fit. In addition to this, the learned judge makes these very cogent observations in his judgment: "I add, in conclusion, that I think that it would be an extraordinary thing if there was a misfit, and the plaintiffs, who were particularly in search of what was wrong, never found it. They were not the only persons who were in search of it. Mr. Selman went up, the engine builders went there, and all sorts of people went there. The rudder people went there, because the rudder was blamed for the noise at one time. They were all eagerly in search of something, and somebody to accuse, or select, as the cause of the trouble, and they none of them found a misfit. Apart from that, it would have been very extraordinary to my mind if the plaintiffs fitted badly the first propeller, then fitted well the *Athelbeach* propeller on both ships, the *Athelbeach* and the *Athelfoam*, then fitted badly again the first replace propeller, and then fitted well again the second replace propeller. It is altogether a combination of coincidences which I do not think existed." I attach some importance to this, because up to a certain period in the case the defendants' case was that it was the bad fitting that was the cause of the noise. I dismiss, therefore, the main contention put forward at the trial that the noisy behaviour of the propeller was not caused by any unfitness of the propeller to work without undue noise when attached to the engines of the *Athelfoam*, but was due to the negligent manner in which it had been fitted on the shaft.

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(1) 17 Times L. R. 265.

(2) 10 Com. Cas. 67.

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Two other contributing causes were put forward by the defendants: (*a*) the low pitch ratio; (*b*) the critical revolutions of the Werkspoor Diesel engine. If the defendants were under obligation to supply a propeller which would be reasonably fit for its work on this ship, it had to be a propeller which would be reasonably fit at any revolutions which in the ordinary course of navigation it would be necessary to run the engine at, and as the defendants were informed of the low pitch ratio and took no objection to it, it would be no answer for them to say that the low pitch ratio made it difficult for them to make a propeller that would not make undue noise at critical revolutions. It was proved that they did make two such propellers.

The important question remains whether, having regard to the terms of the contract, and the facts proved, the case was brought within the words of sub-s. 1 of s. 14 of the Sale of Goods Act. There is no difficulty about the words of the first part of the section. The plaintiffs did make known to the seller that they wanted a propeller for the particular purpose of being used as the propeller of ship No. 972. The difficult question is whether, in making known the particular purpose, they did make it known "so as to show that they relied on the seller's skill and judgment." This is not an easy question to answer. One has to look with care at what they were told in the order. The order reads as follows: "Job. Engines No. 972. Propeller of special Parsons' manganese bronze. One four-bladed, right hand solid propeller, to be 16 feet diameter with a pitch of 11 feet, and to have a total developed area of 80 square feet in four blades. Maximum B.H.P. 2150 at 105 revolutions per minute. Propeller to be supplied finished machined complete and polished all over in highest class style, with boss bored, faced, and keyway cut to our template, edges brought up to fine lines, true to pitch; ready for fitting to shaft on delivery. Please notify us in good time when ready for templates. Copy of pitch readings to be sent to us for our information. Sweeps, boards, etc., to be supplied by you. For further particulars see print No. 206,699 a copy of which you have.

To be guaranteed against defective material and workmanship for a period of six calendar months after handing over of vessel to owners. To be to the entire satisfaction of the owners' representative and ourselves." It is obvious that a shipbuilder in ordering a propeller, whether he trusts to the seller's skill and judgment or his own, must prescribe the size of the propeller that he requires, and that the prescription of size in the case of a propeller necessarily involves the length from the centre of the boss to the tip, the width of the various parts of the propeller, and the maximum thickness which is at a line near the centre of the propeller, and, inasmuch as he will be known to be responsible for the speed, he must necessarily prescribe the pitch and the circumference. The rest of the essentials required for a good propeller he, in this case, left to be determined by the skilled propeller maker. The propeller had to be made of the defendants' Parsons' manganese bronze. The exact composition of that metal is known to the defendants alone. They, and they alone, have to determine the proportion of the different alloys that go to make up their manganese bronze, and to see that those proportions are strictly observed in the propeller they manufacture. The proper and safe method of smelting the metal, the exact temperature at which it ought to be when poured into the mould, the means whereby the presence or absence of blow-holes or any latent defects in the castings can be controlled and eliminated, are matters necessarily left to the decision of the propeller maker. Further, though the extreme thickness of the blade was specified by the buyer, the rate at which that thickness was to be reduced between the thickest point and the fine edge was left to the defendants to decide, and this necessarily includes the thickness of each blade within a few inches from the edge. Mr. Mearns in his evidence on behalf of the defendants agrees that there was only one dimension at one place, for the centre of the blades, and that all the rest of the thickness of the blade was a matter for him as a propeller expert. It is true he added that if particular importance had been attached to the thickness of the edges :

"We should have expected a dimension to be put there by the builders," but whether they were important or not, they were left to him to determine. Mr. Lewis, the defendants' foundry manager, agrees that somebody in their works would have to decide how the blade should lie in respect of thickness between its maximum and its edge in either direction, and says that the works draughtsman, Mr. Gibbs, would be responsible for that, and that probably the works draughtsman and the foreman pattern maker would be so responsible, after consultation. The effect of all this evidence is that there were many important matters relevant to the quality of the propeller when finished and tendered by the defendants that the plaintiffs left to the defendants' skill and judgment. It is not contended that there was anything abnormal in the construction of the *Athelfoam*, or its engines, which might cause any special difficulty to the propeller makers in providing a reasonably suitable propeller. In the defendants' letter to the plaintiffs of November 25, 1930, the defendants say: "The material which we used is the usual manganese bronze such as we have employed for hundreds of propellers for all classes of ships," and they gave the names of several motor vessels which they had supplied with propellers which were remarkably silent and steady running. They knew that this vessel was either a motor vessel or a vessel with reciprocating engines. Mr. Mearns admits this. He therefore knew that he had to supply a propeller for a vessel whose engines would at times have to work to critical revolutions, and he also knew that he had to supply a propeller that would work at the specified pitch ratio which he described as low. In my judgment there was an undertaking on the part of the defendants that the propeller supplied would be reasonably fit for the purpose of being used as the propeller of ship No. 972, but I am inclined to think that there would be an implied proviso that neither the engine nor the ship was abnormal, and also an implied proviso that there was nothing in the specification or description of the propeller required which would make it impossible for a reasonably suitable propeller to be supplied. There is no reason to differ from the learned judge's finding that there was nothing abnormal about the ship or the engine, and the fact that the defendants made two propellers which were reasonably fit to propel the *Athelfoam* without making a nuisance and danger to navigation is conclusive that the description and specification to which the defendants were required to work did not make it impossible for them to make a propeller reasonably fit for the purpose.

The contract we have to consider is not a contract for work and materials. In such a contract it may be right to imply an undertaking that the materials will be of good quality and the workmanship carried out with reasonable skill and care. The contract under consideration is a contract of sale, and the seller gives no undertaking as to the quality of the materials unless the case is brought within one or other of the sub-sections of s. 14 of the Sale of Goods Act. The only terms relating to quality, if any, must be such as can be implied in a contract of sale. Unless the case is brought within one or other of the sub-sections of s. 14 the buyer gets no warranty of quality at all. Sect. 14 expressly says so. I am speaking now apart from express warranty. If the propeller when delivered complied with all the specified dimensions, including the pitch ratio, but had defects in the material such as blow-holes, the plaintiffs would have had to accept it, unless there was implied in the contract one or other of the terms dealt with in the sub-sections to s. 14. It seems to me that sub-s. 1 must apply in a case like the present where the exact composition of the material and the distribution of the weight, and in part the shape of the goods ordered, are not specified, but left to the discretion of a skilled manufacturer. I think that the request for a propeller means this: "We tell you the size that we want, and we give you the plan which gives the dimensions, but we rely upon you to give us a propeller which will be suitable for its purpose, and of those dimensions."

A number of decisions both before and since the Sale of Goods Act were cited to us as bearing on the question, what

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is sufficient to prove that the buyer has made known to the seller the particular purpose for which the goods are required, so as to show that he relies on the skill and judgment of the seller. None of the cases establish any proposition of law that prevents an inference from the facts proved in this case that the plaintiffs did make known the purpose for which they required the propeller, so as to show that they relied on the defendants' skill and judgment. So far as authorities are helpful in a case of this sort, I take the same view as the learned judge, that they support the conclusion to which I have arrived. I refer especially to *Shepherd* v. *Pybus* (1); *Jones* v. *Just* (2); *Manchester Liners, Ld.* v. *Rea, Ld.* (3); and *James Drummond & Sons* v. *Van Ingen & Co.* (4)

It was also contended for the plaintiffs that the express guarantee of material and workmanship contained in the contract excluded the implied condition under s. 14. In face of the decision of the House of Lords in *Wallis, Son & Wells* v. *Pratt & Haynes* (5) and the decision of this Court in *Baldry* v. *Marshall* (6) this contention cannot succeed.

I do not think it necessary that I should say anything on the question whether the learned judge was right in accepting Mr. Little's theory as to what caused the propeller to be noisy. Considerable doubt is thrown upon this theory by the additional evidence which we have received, but I do not think it necessary to determine what exactly caused the propeller to be noisy. It was, in fact, noisy, and by common agreement unfit for use on the normal ship for which it was ordered, and in my judgment the first two propellers did not comply with the defendants' contract. I am not satisfied that Mr. Little was wrong, but, on the other hand, I am not satisfied that he was right. But it is clearly proved that the undue noise was not due to anything in the dimensions or other matters specified in the contract, or to the character of the engine. These elements were all present

(1) 3 M. & G. 868.
(2) L. R. 3 Q. B. 197.
(3) [1922] 2 A. C. 74.
(4) 12 App. Cas. 284.
(5) [1911] A. C. 394.
(6) [1925] 1 K. B. 260.

when the two propellers that made no objectionable noise were used. It must, in my judgment, have been due to something in the construction of the propeller that was left by the buyers to the sellers' skill and judgment. With regard to the claim that the propeller was not merchantable, there was, in my judgment, no evidence that the propeller had faults that made it unsaleable as a propeller. It might have done quite well for a turbine engined ship which has no "criticals," and possibly for some other of the various kinds of engines that are not abnormal.

It only remains for me to deal with the defendants' appeal from the directions of the judge with regard to the damages, and the plaintiffs' cross-appeal against the judge's direction excluding from the damages those claimed under para. 9 of the amended points of claim.

Although I think it right to finish what I have to say about this, having regard to the decision of my colleagues it will make no difference to the result of this case.

The defendants contend that the learned judge was wrong in deciding that the plaintiffs were entitled to any damages beyond the compensation which they received by reason of the fact that after the breach they obtained from the defendants a propeller which complied with the contract, and that they had been relieved by the judgment from paying for this substituted propeller. In my judgment the decision of the learned judge was right. I think it was in the ordinary course of events resulting from the defendants' breach of warranty that the plaintiffs (*a*) incurred expense beyond their first trial of the propeller in an endeavour to satisfy the owner, if possible, that there was nothing wrong with the propeller, and (*b*) in using the propeller in trials beyond those that would have been required if the propeller had been reasonably fit for its purpose before they finally ascertained that it was not so fit. Of course it must be conceded that the plaintiffs would have had to run the vessel to test the propeller once if it had been in accordance with the contract, but they would not have required more than one trial. They have, however, been obliged by reason of the defendants'

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breach of contract, acting reasonably, and in the ordinary course of things on the faith of the defendants' warranty, to use the propeller in a number of trials in order to determine what was the cause of the noise. I think the expenses caused to the plaintiffs by the running of these additiona trials, to the extent which they may be held to have been reasonably necessary to determine whether the propeller was, or was not, in accordance with the contract, occasioned to the plaintiffs losses directly and naturally resulting in the ordinary course of events from the breach of warranty. I cannot distinguish in principle losses so occasioned from losses occasioned by putting a warranted article into use in reliance on the warranty. Losses occasioned by such use have always been held to be recoverable as directly and naturally resulting in the ordinary course from a breach of warranty. There are many examples in the reported cases of such damages having been recovered: see *Randall* v. *Raper* (1); *Frost* v. *Aylesbury Dairy Co.* (2); *Hammond* v. *Bussey* (3); *Mowbray* v. *Merryweather* (4); *Molling & Co.* v. *Dean & Son, Ld.* (5); and *Richard Holden, Ld.* v. *Bostock & Co., Ld.* (6) These cases would not support a claim for consequential damages through the use of the article if the defect were apparent from a reasonable examination before it was put into use, but it is clear that whatever was wrong with the propeller in this case was not apparent on examination. None of the skilled people who saw the propeller on the ship had any suspicion that the noise was due to any defect in the propeller until after the *Athelbeach* propeller was tested on the *Athelfoam*. In my judgment the plaintiffs are entitled to recover such expenses as they reasonably incurred by trying the propeller on the ship until they discovered that the defendants had not complied with their warranty. They will be entitled to the expense of all the trials except such as they would necessarily have required if the propeller had been in accordance with the contract. It will be for the tribunal of fact to determine how much of the expenses claimed were reasonably incurred.

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(1) (1858) E. B. & E. 84.
(2) [1905] 1 K. B. 608.
(3) (1887) 20 Q. B. D. 79.
(4) [1895] 2 Q. B. 640.
(5) (1901) 18 Times L. R. 217.'
(6) (1902) 18 Times L. R. 317.

With regard to the plaintiffs' cross-appeal, I think the learned judge was right in excluding the damages claimed in para. 9 of the amended points of claim, on the grounds stated in his judgment.

The result, if it depended upon my judgment, would be that this appeal would be dismissed, and the learned judge's judgment would remain, and the damages would have to be assessed; but as my Lords both differ with me the judgment will be in the opposite direction.

March 1. The case was mentioned again, when it was admitted that the Manganese Bronze Company were entitled to judgment on their counterclaim for the price of the two replace propellers.

Appeal of defendants allowed.

Solicitors for Manganese Bronze and Brass Company, Ld.: *Linklaters & Paines.*

Solicitors for Cammell Laird & Co., Ld.: *Gregory, Rowcliffe & Co., for Laces & Co., Liverpool.*

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LAVELL AND COMPANY, LIMITED *v.* A. AND E. O'LEARY.

[1932. L. 1828.]

Landlord and Tenant—Distress for Rent—Impounding—Goods left on Debtor's Premises—Walking Possession Agreement—Removal of Goods by Contractors acting without Knowledge of the Distress—Removal from outside Pound—Alleged Pound-breach—Action for Treble Damages—Sale of Distress Act, 1689 (2 *W. & M., Sess.* 1, *c.* 5) (1)—*Distress for Rent Act,* 1737 (11 *Geo.* 2, *c.* 19), *s.* 10.

The landlords of premises let for a café distrained for rent in arrears, and the bailiff for the convenience of and by agreement with the tenant only took what is called walking possession, with the result that the goods remained in the café and the bailiff only called to inspect them once a day. While this position continued, the tenant in breach of his agreement removed the goods, and for this purpose obtained from the defendants, a firm of removal contractors, lorries for the carriage of the goods. These were supplied by the defendants in the ordinary course of their business and in ignorance that the goods had been impounded. Their drivers helped to bring the goods down from a landing outside the café to which they were brought by employees of the tenant. Proceedings having been brought against the defendants to recover treble damages for pound-breach under the Sale of Distress Act, 1689, s. 3, and the Distress for Rent Act, 1737, s. 10:—

Held, by the Court of Appeal (1.) that the goods were validly impounded in the café not merely as against the tenant but as against all the world; but (2.) that the defendants had not been guilty of pound-breach, as their employees did not take the goods out of the pound.

Washborn v. *Black* (1774) 11 East, 405*n.*; *Firth* v. *Purvis* (1793) 5 T. R. 432; and *Thomas* v. *Harries* (1840) 1 Man. & G. 695 followed on the first point.

Decision of Macnaghten J. affirmed but on different grounds.

ACTION tried by Macnaghten J. without a jury.

By an indenture of lease, dated December 19, 1928, the plaintiffs, Lavell & Co., Ld., demised to a Mr. Wong Gee the first floor of premises at Nos. 113, 115 and 117 Charing Cross Road, Westminster, for the term of seven years from September 29, 1928, and he covenanted to pay the yearly rent by four equal quarterly payments in advance on the named quarter days. Mr. Wong Gee entered into possession of the demised premises and there carried on the business of a restaurant known as the Canton Café. On June 17, 1932, the plaintiffs levied a distress on some of the furniture at the Canton Café for rent then in arrear, amounting to 30*l.* 9*s.* 7*d.* The bailiff, a Mr. Almond, acting under a warrant signed by the plaintiffs, seized and distrained certain tables, chairs and other chattels of sufficient value to answer the distress.

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(1) *Ad fin.* The sections are differently numbered in different editions.

At common law a landlord who had distrained for rent in arrear was required to take the goods to a pound, and, in the case of such goods as those distrained in this case, to a covered pound. Sect. 10 of the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), provided that a person taking any distress for rent may "impound or otherwise secure the distress so made." (1)

According to what had long been the practice in such cases, Mr. Almond, the bailiff, did not remove any of the goods which he had distrained from the demised premises, nor did he leave any one in possession of them. A document headed "Short Walking Possession Agreement" was signed by Rachel Tam, on behalf of Mr. Wong Gee, which was as follows :—

"To P. H. Almond, Bailiff. For my convenience and in consideration of your not leaving your man in close possession of the goods, chattels, and effects distrained upon by you at Canton Café, 113/117 Charing Cross Road, I hereby agree : (1.) To pay the lawful fees in respect of your man as if he were in close possession. (2.) That you and your man may re-enter the premises peaceably or by force, if required, at any time. (3.) That I will not remove or allow to be removed from the premises any goods chattels and effects so distrained. Please remove the goods if a sale is necessary. Dated June 17, 1932."

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(1) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 10: "It shall . . . . be lawful to and for any person or persons lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding and securing such distress . . . . and that if any pound-breach or rescous shall be made of any goods and chattels, or stock distrained for rent and impounded or otherwise secured by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy as in cases of pound-breach or rescous is given and provided by the said Statute"—that is, the Sale of Distress Act, 1689.

On June 24, 1932, Rachel Tam, on behalf of Mr. Wong Gee, signed the following request for the extension of time in respect of the distrained goods: "In accordance with the provisions of section 6 of the Law of Distress Amendment Act, 1888, I hereby request you not to remove the goods and chattels which you have distrained and impounded for rent on the premises situate at Canton Café, 113/117 Charing Cross Road, W.C. . . . . and now in my occupation as tenant, but for my accommodation and convenience to keep the said goods and chattels in the place where they are now impounded and to remain in possession of the same until July 1, 1932, next inclusive, after which date I request you to remove sufficient effects to satisfy the amount of the distress and all expenses. I also agree to give security for any additional cost that may be occasioned by such extension of time . . . . or, in default, that you may sell sufficient goods to satisfy the same." In response to a further request in writing, the time for taking the distress was extended to July 14.

On July 5 the plaintiffs had levied a second distress on the rest of the furniture and effects at the Canton Café for rent amounting to 97*l.* 11*s.* 6*d.*, which had been due on June 24. The bailiff followed the same course as on the previous occasion. He did not remove any of the goods on which he had distrained, but left them where they were. On July 11 a request was made in respect of that second distress for an extension of time to July 14, 1932.

The defendants, Messrs. A. and E. O'Leary, who were a firm of high repute and long established, carried on business as removal contractors. The offices of the firm were in Frith Street, adjacent to Charing Cross Road. On July 13, 1932, the day before the expiry of the extended time, a young woman called at the offices of the defendants and requested them to send a lorry to 113 Charing Cross Road, early next morning to remove some furniture to an auction. There was nothing in that request to arouse any suspicion of any sort. It was stated in evidence by a member of the defendant firm that it was a matter of everyday occurrence to receive such a request, and it was arranged that a lorry should be sent to 113 Charing Cross Road on the following morning, at a charge of 5*s.* an hour. Accordingly, on July 14, at about 8 A.M., a one-ton lorry belonging to the defendants and driven by a man in their employ, named Hawkins, arrived at 113 Charing Cross Road to remove the furniture. Hawkins, the driver of the lorry, found two men waiting outside the Canton Café, and they took him up to the café and opened the door and showed him the goods which were to be taken away. Hawkins saw that the one-ton lorry would not be sufficient to convey all the goods, and, accordingly, he went to the defendants' offices at Frith Street, and from there a second lorry was ordered to assist the first lorry in taking away the goods. The second lorry was a two-ton lorry, and a charge of 6*s.* 6*d.* an hour was made.

After the arrival of the second lorry, all the goods of the Canton Café were loaded into them. The drivers of the two lorries assisted in that operation, but there was no evidence that either of them actually entered the café for the purpose of removing the furniture. Evidence was given by them that the two men who had been waiting outside the café removed the furniture on to the landing, and that the two lorry drivers merely assisted in carrying them down the stairs and loading them on the lorries. The young woman had said on the previous day that the goods were to go to some auction. After the lorries had been loaded, one of the two men who had been waiting outside said that "the governor had changed his mind," and wanted the goods taken to Brixton. So, under the guidance of those two men the lorries were driven to Brixton. When they got there they were told to turn down a little side-street, and there a larger lorry was found waiting, and after the payment of the charges for the lorries, the goods were transferred from the defendants' lorries into this larger lorry.

The plaintiffs brought this action claiming treble damages and costs under s. 4 of the 1st Sess. 2 William and Mary, c. 5. (1)

It was not disputed that the defendants acted in good faith. They had no reason for thinking that there was anything wrong in what they were doing. It was a perfectly ordinary occurrence. If the defendants had known about it the transfer of the goods in Brixton might have raised some suspicion that all was not above-board. The plaintiffs contended that they were entitled to judgment for the carrying away of the goods which were removed in the defendants' lorries.

J. P. Eddy and *C. S. Davis* for the plaintiffs.
W. H. Cartwright Sharp for the defendants.

MACNAGHTEN J. stated the facts, and continued: It is on those facts that the plaintiffs contend that they are entitled to judgment for the carrying off of the goods which were removed in the defendants' lorries. The action was brought under the statute of William and Mary. The statute, which enables the landlord to secure or impound the goods distrained on upon the premises chargeable with the rent, provides that if any pound-breach or rescous shall be made of any goods or chattels, or stock, distrained for rent, and impounded or otherwise secured by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy, as in cases of pound-breach or rescous is given and provided by the said statute.

It was argued on behalf of the defendants, in the first place, that they were not guilty of pound-breach, because, although they supplied the lorries for the removal of the goods and their employees actually loaded them up, they did not actually move the goods out of the café. The two men, it was said, moved the tables and chairs out of the café and the defendants did no more than carry them down from the landing and put them in the lorry. In my opinion, if the Canton Café had in law become a pound, the plea so set up by the defendants does not avail them. It was conceded that if the offence of pound-breach is committed, the fact that it is committed unwittingly does not matter, and it seems to me that persons who supply the means of committing the offence—because, unless these lorries had been supplied, Mr. Wong Gee would not have been able to move the goods—must come within the class described in the statute as offenders and be liable to treble damages. But if that plea fails, the question then arises whether the goods at the Canton Café were in fact in a lawful pound on the morning of July 14, 1932. If they were in a lawful pound on that day, the fact that Mr. Almond, the bailiff, had left no man in possession is plainly immaterial, that point being decided by earlier authority in a case of *Jones* v. *Biernstein*. (1) In that case, rent being in arrear, distraint was made on the premises, and, as the county court judge found, the plaintiff did everything that was required for impounding the goods on the premises within the meaning of s. 10 of 11 Geo. 2, c. 19. On Saturday night this man left the premises and did not return until Monday. During his absence the defendant, who was the true owner of some of the goods distrained, entered the house and removed his goods. In an action for pound-breach the county court judge found that the man in possession had no reasonable necessity for his absence, and that he had therefore abandoned possession, but that, as he had intended to return, he had not abandoned the distress, and might be considered as in constructive possession. He, however, held that real possession was necessary, and entered judgment for the defendant.

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(1) Sale of Distress Act, 1689 (2 W. & M. c. 5), s. 3, sub-s. 1: "And be it further enacted by the Authority aforesaid, that upon any pound-breach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover his and their treble damages and costs of suit against the offender or offenders in any such rescous or pound-breach, any or either of them, or against the owners of the goods distrained in case the same be afterwards found to have come to his use or possession."

(1) [1899] 1 Q. B. 470; [1900] 1 Q. B. 100.

There was an appeal, and it was held by the High Court and by the Court of Appeal that where goods distrained for rent had been impounded on the premises, it was not necessary that any one on the landlord's behalf should be left in possession of the goods. In the Court of Appeal the judgment of Vaughan Williams L.J. shows that his Lordship was doubtful whether the finding of the county court judge that the goods had been impounded was right. But as that was a finding of fact, it was a finding that could not be questioned in the Court of Appeal. The case is also of interest, because Channell J. in this Court stated that the question of what amounted to impounding was a difficult one, although it was one which he was not called upon to decide in that case. Considering the length of time which has elapsed since the Act of Geo. 2 was passed, there have been very few decisions on it. In *Washborn* v. *Black* (1), which was an action for trespass for entering a house and taking goods, etc., this was done in taking a distress for rent. After the distress was taken a man was left in possession till the fifth day, and then the goods were replevied. During the five days the person left in the house went into different parts of it. It was said that he was a trespasser; for he ought either to have put the goods all into one room, and kept possession of that only, or to have removed the goods out of the house. Lord Mansfield C.J. said that the strict law was so; and that a man might, if he pleased, have stripped every room and put all the goods together, and by that means greatly damaged them; but, instead of doing that, he acted for the benefit of the plaintiff and left the goods as he had found them: therefore, he should leave it to the jury to consider whether the plaintiff did not consent. The only evidence of consent was that Mrs. Washborn had said how much she was obliged to Mr. Mountfort, who had acted like a gentleman. And on this his Lordship left it to the jury to consider whether the plaintiff did not consent to an act which he said was clearly for his own benefit.

The statute of Geo. 2, which authorizes a man to impound or otherwise to secure the distrained goods on the premises,

(1) 11 East, 405*n*.

has placed on him the obligation to put them in some secure place, and then if he does leave the goods distributed through the house for the convenience of the tenant, and with the consent of the tenant, then the tenant cannot be heard to complain here that the goods had not been impounded. In *Washborn's* case (1), as in all the other cases dealing with the matter, the question arose between the landlord and the tenant; it did not arise between the landlord and a stranger, as it arises in this case. The opinion of Lord Mansfield in the case which I have cited was quoted with approval by Parke B. in *Woods* v. *Durrant* (2), where he said: "*Washborn* v. *Black* (1) is an authority, that, in common cases, the party distraining in a dwelling-house must not take the whole of it in which to place the goods, but must select one room for that purpose, or remove them out of the house."

One of the earliest cases where this question arose was *Firth* v. *Purvis.* (3) There the landlord had distrained on four pipes of beer, and shortly after the defendant came and apparently took away the beer, and in an action for pound-breach it was held that those four pipes of beer had been properly impounded under the Act of Geo. 2, although they had been left exactly as they were before the seizure in the cellar of the house. In a subsequent comment on that case it was said that the question really did not arise, because it was admitted that the impounding had taken place. Moreover, four pipes of beer would in fact be locked up; it would not be expected that the cellar would be left open as the Canton Café was left open in the present case.

I think that the authorities establish that as between the landlord and the tenant, the landlord who has distrained and has left the distrained goods on the premises is not bound as against the tenant to keep them as impounded, although the goods are left in precisely the same position as they were before seizure took place. The plaintiffs relied on *Tennant* v. *Field* (4), the headnote of which reads: "A landlord entered upon a dwelling-house held of him, to distrain for rent arrere. To prevent inconvenience to the tenant, the landlord, with the tenant's assent, instead of removing the articles of furniture, upon which he proposed to distrain, made up, from a list given to him by the tenant, an inventory of the furniture in the house, put a man into possession, and handed to the tenant a notice of the distress referring to the inventory, which was also then handed to the tenant. The landlord did not go into the several rooms in which the articles were. Held, that this constituted a distraining of the articles mentioned in the inventory and an impounding of them upon the premises; and that a tender subsequently made was too late. Although the notice of distress did not state that the articles were impounded." The law is that if the tenant tenders rent after distress and before impounding, the landlord is bound to accept the tender so made. The tender does not make the seizure unlawful, but it does make a further retention of the goods unlawful. Whereas, if the goods have not only been seized, but distrained and impounded, it is then too late for the tenant to tender rent. Replevin is the only remedy. In that case all the judges say that the goods were impounded in accordance with the statute Geo. 2; but it is to be observed that it was a case as between the landlord and the tenant, and the landlord had merely omitted to secure, and had left the goods as they were with the tenant's consent and for the tenant's convenience.

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(1) 11 East, 405*n*.
(2) (1846) 16 M. & W. 149, 158.
(3) 5 T. R. 432.
(4) (1857) 8 E. & B. 336.

Kemp v. *Christmas* (1) is also a case where a similar treatment of the distrained goods was held to amount to impounding as against the tenant.

It is said that as against a stranger the landlord cannot be heard to say that the provisions of the statute of Geo. 2 have been duly complied with. It is necessary to see what the words of the statute actually say. The law was making a change in allowing the distress to be secured upon the premises, and the words are: "it shall and may be lawful to and for any person or persons lawfully taking any distress for any kind of rent, to impound, or otherwise secure the

(1) (1898) 79 L. T. 233.

distress so made . . . . in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient. . . . ." The words are "to impound, or otherwise secure." The word "otherwise" indicates that the Legislature implies the impounding of the goods as a securing of them, and against what? Against the danger of removal by the tenant or by anybody else.

Now, in this case, these goods in an open restaurant are left just as they were. No step of any sort was taken to secure them against removal by anybody. Nobody was left in possession to guard against removal, and although as between Mr. Wong Gee and the plaintiffs Mr. Wong Gee could not be heard to say that the goods had not been impounded, as between the landlord and a stranger the landlords have failed to prove that they complied with the provisions of the statute of Geo. 2; they have failed to prove that they "impounded, or otherwise secured" the goods, and having failed to prove that, they are not therefore entitled to their remedy given by the statute of William and Mary, and cannot maintain this action.

It is an interesting case, and in case the matter should be taken further it seems desirable that I should fix what the value of the goods was at the time of their seizure. It was argued on behalf of the defendants that I ought not to find that the whole of the goods seized by the plaintiffs had been removed. The evidence was that the man in "walking possession," if that is the right description of him, had walked into the café on the night of July 13, and had there found all the goods which had been seized by the bailiff; and the evidence is that on the following morning, after the lorries had gone away, the Canton Café was swept and garnished. There was nothing left except the linoleum. The only inference is that all the goods that were seized were in the lorries. What, then, is their value? The question of what the goods were actually worth is a matter of evidence, and I fix the value at 50*l.* If the plaintiffs are entitled to succeed in the action they are entitled to 150*l.* and costs.

In my judgment, however, the action is not maintainable, and must be dismissed.

T. W. M.

The plaintiffs appealed. The appeal was heard on March 28 and 30, 1933.

J. P. Eddy and *C. S. Davis* for the appellant. The first five paragraphs of the statement of claim were under the new procedure proved by affidavit. They included an allegation that the goods and chattels were duly impounded, and this was never denied and no application was made to cross-examine. The defendants cannot therefore deny that the goods were duly impounded against them and, indeed, did not seek to do so; and, as this was not in issue before Macnaghten J., he was not entitled to hold that the goods were not validly impounded as against the defendants. Secondly, the goods were impounded in accordance with the Distress for Rent Act, 1737, s. 10; and, if validly impounded, they are impounded as against every one and for all purposes, and the plaintiff was entitled to damages as provided by s. 4 of the Sale of Distress Act, 1689, for pound-breach. It is immaterial whether goods are impounded on or off the premises: Halsbury's Laws of England, vol. 11, p. 193; *Washborn* v. *Black* (1); *Woods* v. *Durrant* (2); *Firth* v. *Purvis*. (3) Macnaghten J. incorrectly said that *Firth* v. *Purvis* (3) was a case as between landlord and tenant, but that is not so, and the basis of the decision was that when once goods have been impounded, they are in the custody of the law as against all the world. That case is approved in *Thomas* v. *Harries* (4): see also *Ladd* v. *Thomas* (5); *Tennant* v. *Field* (6); and *Kemp* v. *Christmas*. (7) *Kemp* v. *Christmas* (7) is also a case where impounding on the premises was upheld as against a stranger, though Macnaghten J. says the contrary. The latest case on the subject is *Jones* v.

(1) 11 East, 405*n*.
(2) 16 M. & W. 149, 158.
(3) 5 T. R. 432.
(4) 1 Man. & G. 695.
(5) (1840) 12 Ad. & E. 117.
(6) 8 E. & B. 336.
(7) 79 L. T. 233.

Biernstein (1); and the effect of the whole line of authorities is that goods impounded on the tenant's premises, even though not secured in any way, are in the custody of the law and validly impounded as against all the world.

Macnaghten J. held that if the goods had been validly impounded as against the defendants, they had committed pound-breach, and that being so the appeal ought to be allowed.

W. H. Cartwright Sharp for the respondents. It is not sought to support Macnaghten J.'s decision on the ground that the goods were not validly impounded, except as against the tenant, as no authority can be found to support this view. But in fact the defendants never committed pound-breach. Their servants never entered the pound but, after the offence of breaking the pound had been committed by the tenant's employees, assisted to remove the goods from the landing outside the café and load them on to the lorries. The landing was no part of the pound, and the pound was broken as soon as the goods were taken out of the café. Macnaghten J. refused to accept this contention, on the ground that persons who supply the means of committing the offence of pound-breach are offenders under the Act of 1689. There is no justification for this. A pound is only broken by removing the impounded goods from it.

[LORD HANWORTH M.R. If not guilty of pound-breach, the defendants may have committed a "rescous."]

"Rescous" can only take place before goods are impounded and when they are being taken to the pound: Co. Litt. 160 b; Selwyn's Law of Nisi Prius, 13th ed., p. 608.

[LORD HANWORTH M.R. That seems to be correct.]

The landlord has no right of property in goods impounded, and therefore the removal of the goods by the defendants' employees, after the pound had been broken, which if the landlord had had any property in them might have amounted to conversion, constitutes no offence. To be liable for pound-breach the offender or his servant must break the pound or have authorized and instigated it: see *Iredale* v.

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(1) [1899] 1 Q. B. 470; [1900] 1 Q. B. 100.

Kendall. (1) Here the only service given was that of two lorries with men to drive them. That cannot make the defendants joint tortfeasors in pound-breach. The appeal should therefore be dismissed.

J. P. Eddy replied and referred to Redman's Law of Landlord and Tenant, 8th ed., p. 533, and Co. Litt. 47 b.

LORD HANWORTH M.R. This appeal has raised an interesting point, which has been well argued on both sides, but we have come to the conclusion, for reasons somewhat different from those expressed by Macnaghten J., that the appeal fails. [His Lordship stated the facts down to the walking possession agreement, and continued :] We have been told that originally the distress taken by a landlord was taken by way of pledge ; he had no power to sell the goods distrained, but he could hold them until the tenant paid him the amount owing for the rent. In order to make the landlord's remedy more effective a statute was passed in 1689, now called the Sale of Distress Act, 1689, being : " An Act for enabling the sale of goods distrained for rent in case the rent be not paid in a reasonable time." That enabled a sale to be made if the owner of the goods distrained did not within five days next after such distress taken and notice thereof replevy the same. After that a statute was passed in 1738 which enabled the landlord to impound or otherwise secure the distress upon the premises and have the goods sold there, and the last portion of s. 10 says : " That if any pound-breach or rescous shall be made of any goods and chattels or stock distrained for rent and impounded or otherwise secured by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy as in cases of pound-breach or rescous is given and provided by the said statute," that is the statute of 1689, which had by s. 4 enacted that upon any pound-breach or rescous of goods or chattels distrained for rent the person or persons aggrieved thereby should in a special action upon the case for the wrong thereby sustained recover treble damages and costs of suit. The result, therefore, of those statutes was that there was a power of sale, and if there was any pound-breach or rescous, those persons who offended in that way were liable, not merely for damages, but for treble damages.

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(1) (1879) 40 L. T. 362.

One other statute I must refer to, and that is the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 6, which provides: "The period of five days provided in the said Act of William and Mary, chapter 5, within which the tenant or owner of goods and chattels distrained may replevy the same, shall be extended to a period of not more than fifteen days if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional cost that may be occasioned by such extension of time: Provided that the landlord or person levying the distress may, at the written request, or with the written consent, of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid." Now when these distresses had been levied and the walking possession agreement had been entered into, by an agreement made on June 24 in accordance with s. 6 of that Act, the tenant requested the landlord not to remove the goods which he had distrained and impounded for rent, but to keep the goods and to remain in possession of the same until July 1. By an agreement made on June 30 that time was further extended till July 4, and by a further agreement made on July 4 that time was extended to July 14. The importance of those agreements is that the tenant by their terms recognizes that the landlord has distrained and has impounded for rent the goods and chattels which are on the premises at 113, 115 and 117 Charing Cross Road, and he also says: "after which date I request you to remove sufficient effects to satisfy the amount of distress and all expenses." What happened subsequently was that on July 14 the goods were removed. It appears from the evidence that the defendants, who are, as Macnaghten J. has found, a responsible firm of removers of good repute, were called upon to send a van early in the

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morning of July 14 for the purpose of removing the goods. On that morning an entry was made by the tenant's servants upon the room where the restaurant was carried on and where the goods had been all the time safely impounded, and the goods were brought out on to a landing of the staircase used by the tenants of the premises. It was after they had been brought out that the servants of the defendants loaded them into two lorries. Evidence was given at the trial that the value of the goods that were taken away was 79*l.* 5*s.*, but Macnaghten J. fixed the value in case damages were to be imposed at 50*l.*

This action is brought, it will be observed, not against the tenant, but against the defendants who are the removers, and the charge is made against them that they were guilty of pound-breach and had wrongfully seized and taken away the goods so impounded as aforesaid and brought themselves, therefore, within the ambit of s. 4 of the Act of 1689 under which they would be liable as offenders guilty of pound-breach to treble damages. Before Macnaghten J., Mr. Cartwright Sharp took up the same attitude which has been taken up in the defence, which stated : "It is admitted that on the 14th of July, 1932, servants of the defendants in the course of their employment in the defendants' business as removal contractors carried down certain goods (to wit some Bentwood chairs and small deal tables) from the landing on the first floor of premises known as Nos. 113, 115 and 117 Charing Cross Road in the County of London, placed such goods in the defendants' lorries and drove away therewith," and a note has been furnished us by counsel for the appellants to the effect that the evidence by affidavit under the new procedure was accepted. This note contains the following statement : "No question was asked of any witness, either by me or by Mr. Cartwright Sharp, to show that the goods were or were not impounded : The action was fought throughout on the footing that the goods has been admittedly impounded on the premises, and that the only question between the parties was whether the defendants were responsible for breaking the pound. No question as to the sufficiency of the impounding was raised by Mr. Cartwright Sharp in his final speech for the defendants, nor by his Lordship, until I was in the middle of my final speech for the plaintiffs, when for the first time his Lordship indicated a doubt as to whether the goods had in truth been properly impounded." Ultimately Macnaghten J. came to the conclusion that the goods had not been properly impounded as against the defendants, who were not tenants, but were strangers to the tenancy.

Upon that point Mr. Eddy has convinced us that the decision of the learned judge is untenable. It must be remembered that when once goods have been impounded they are in custodia legis, as Channell J. says in *Jones* v. *Biernstein*. (1) That being so, was there in this case a pound? Although the agreement was made which recited that there was a pound, Macnaghten J. seems to have had a doubt whether the facts in this case sufficed to establish a pound as against these present defendants. In my view the facts clearly establish a pound, not merely against the tenants, but against everybody else, because it is proved that these goods were in custodia legis. I need only refer to three of the cases that have been cited. *Washborn* v. *Black* (2), a case which came before Lord Mansfield in the year 1774, shows that there can be a pound, although all the goods on which a distress has been levied are not taken and placed all together in a room or compartment, and that it is quite possible to impound the goods while they still remain in situ. In that case the jury found that the plaintiff consented to what had been done. The importance of the case is that it shows that there is no duty imposed upon the landlord to collect the goods in order to impound them, and that the goods can still be treated as impounded even though, as in that case, it was by consent that they were not collected together. In *Firth* v. *Purvis* (3) some pipes of beer had been impounded in the sense that they had been marked by the landlord, but remained in situ, and it was held, after argument, by the learned judges in that case, that there had been within the meaning of the statute an impounding of the goods. There the goods had neither been removed nor placed under lock and key, but they had merely been marked as having been impounded. That case was approved and held to be good law in *Thomas* v. *Harries* (1), where Tindal C.J. said (2): "The case of *Firth* v. *Purvis* (3), which has been cited, appears to me to go the whole length of this. There, nothing was done to the door of the cellar in which the casks were; the party simply gave notice, and the giving of the notice was treated as amounting to an actual impounding." A very learned judge treats that as a sufficient impounding, and therefore it appears to me from that case, and also from the two other cases cited by Mr. Eddy, of *Ladd* v. *Thomas* (4) and *Tennant* v. *Field* (5), that it is unnecessary either to shut up the premises where the chattels are or to collect them together in order to impound them. Lord Campbell says in *Tennant* v. *Field* (6): "Nothing had taken place to prejudice his rights; and the distrainor had abstained from doing what might be injurious to him. The removal might most materially have injured him. Does not this amount to making a pound of the rooms in which the distrained goods were? I am of opinion that it does, and that, consistently with the authorities, there has been an impounding before the tender."

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(1) [1899] 1 Q. B. 470, 472.

(2) 11 East, 405*n*.

(3) 5 T. R. 432.

It appears to me, therefore, particularly since the decision in *Firth* v. *Purvis* (3), a case in which the question of the validity of the impounding arose as against a stranger and not as against a tenant, that the view expressed by Macnaghten J. was too narrow; and that if a pound has been created it must be respected not merely by the tenant, but by strangers as well, because the goods are in custodia legis.

I accept therefore the view presented by Mr. Eddy that in the present case the goods were impounded, and the fact that the pound was broken against the will of the landlord. We have now to say whether the defendants were offenders who were guilty of that pound-breach. That is a question of fact. I agree with Mr. Eddy that it is unnecessary to show knowledge of the pound on the part of the defendants. If, in fact, it was proved that there had been a pound-breach by the defendants, then they would be offenders and liable in damages.

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(1) 1 Man. & G. 695.
(2) Ibid. 703.
(3) 5 T. R. 432.
(4) 12 Ad. & E. 117.
(5) 8 E. & B. 336.
(6) Ibid. 342.

I would say that I agree with the view presented by Mr. Cartwright Sharp that the offence of rescous involves the rescue of distrained goods before they reach the pound, and that pound-breach arises after they have been impounded. The authorities for that proposition are those that he cited to us and particularly those mentioned in Buller's Trials at Nisi Prius, 7th ed., p. 61A.

On the question we have now to decide the learned judge took the view that the defendants were implicated in the pound-breach committed by Mr. Wong Gee. He said in his judgment: The defendants' servants " did no more than carry them down from the landing and put them in the lorry "—carry them down, that is, from a place outside the pound which was common to all the tenants of the premises. " In my opinion, if the Canton Café had in law become a pound, the plea so set up by the defendants does not avail them. It was conceded that if the offence of pound-breach is committed, the fact that it is committed unwittingly does not matter, and it seems to me that persons who supply the means of committing the offence —because, unless these lorries had been supplied, Mr. Wong Gee would not have been able to move the goods—must come within the class described in the statute as offenders and be liable to treble damages." I find myself unable to accept that view. The defendants are entitled to say that their ordinary business is that of removing furniture, that they are summoned day by day in the ordinary course of business to a job such as this. Their evidence is that in the ordinary course they received notice that some furniture was to be removed, and they complied with the order to supply lorries for the purpose in the ordinary course. I do not think it follows from the fact that without the lorries Mr. Wong Gee and his employees would not have been able to remove the goods that the defendants are necessarily offenders. Mr. Wong Gee had broken the pound; he had taken the goods out of the pound; they were on the landing, and certainly had the possession man seen them there, he would have protested and insisted upon their being taken back into the restaurant where the pound was. I think, therefore, that the case is one where the breach having been committed and the pound broken the question arises: Are you to implicate a person who in the ordinary course of business then deals with the goods, are you to make him suffer the penalties which are imposed under s. 4 of the Act of 1689?

It is important to observe that the liability is a heavy one, for the section is intended to impose penal damages upon offenders. There ought then to be clear proof that the defendants were engaged in and assisting at the pound-breach; but I do not find any evidence which justifies our coming to such a conclusion. There is no doubt some evidence that three persons actually entered the restaurant where the pound was, two of whom have been identified but not the third one. But the fact that one is not identified does not justify the inference that he was one of the defendants' men. All the evidence before us points to the view that the defendants were called in to play their part in respect of goods which had been brought outside the pound at a time when the pound-breach had already been committed. I find myself unable, therefore, to accept the view that the plea of the defendants failed.

We find then upon this question of fact that there has been no sufficient evidence to establish that the defendants committed a pound-breach, although we are satisfied upon Mr. Eddy's argument that there was a pound and that it was a valid pound as against the defendants. For these reasons, which are different from those given by the learned judge, we have come to the conclusion that the appeal fails and must be dismissed with costs.

LAWRENCE L.J. I agree, and have very little to add to the judgment delivered by my Lord. In the statement of claim there is an allegation that the goods in question were impounded. The action having been brought under the new procedure rules, when it came before the learned judge for directions after the pleadings had been closed, he directed that this allegation (amongst others) should be proved by affidavit. In accordance with that direction the bailiff made an affidavit stating that the goods in question were impounded. The deponent to that affidavit was not cross-examined, and Mr. Cartwright Sharp, who appeared for the defendants on the trial of the action, informed the Court that he did not intend to dispute any of the facts contained in the affidavit. Therefore there was a clear admission by counsel on behalf of the defendants, who were not the tenants, but were strangers, that the goods had been impounded. Mr. Cartwright Sharp stated in this Court in the frankest possible manner that he made that admission in the Court below deliberately after having considered the authorities, and after having come to the conclusion that he could not successfully dispute the fact that the goods had been validly impounded. Having had our attention called to the cases on the subject, I think he was clearly right in making that admission ; it follows that in the present case it must be taken that the goods had been properly impounded. Mr. Cartwright Sharp further stated that so far as his clients were concerned the only question in the action was whether or not they had committed or had knowingly been a party to the commission of a pound-breach, and that in the Court below the action had been fought upon that single issue. The learned judge reserved judgment, and in the result held that although the goods had been effectually impounded as between the landlord and the tenant, they had not been impounded within the meaning of s. 4 of the statute of 2 William and Mary, as against strangers. In my judgment that finding was erroneous, and moreover was not open to the learned judge after the admission which had been made on behalf of the defendants.

The finding was a surprise to both parties, because after the admission made by counsel for the defendants neither the plaintiffs nor the defendants had directed their minds to the question whether the goods had been validly impounded, and the case was fought throughout on the assumption that the goods had been validly impounded. Moreover I am clearly of opinion that if goods are properly impounded as between the landlord and the tenant they thereupon come into the custody of the law, and that anybody whether the tenant or a stranger who takes them out of the pound, either innocently or with knowledge of the pound, is liable under the Act for the treble value of the goods so taken out.

In the present case the only question in the Court below was and in this Court is whether on the undisputed facts the defendants have committed a pound-breach so as to render them liable under the Act. The defendants are a reputable firm carrying on the business of furniture removers, and have vans which they hire out for the removal of furniture; it is their daily practice to remove furniture to auction rooms and other places for the purpose of sale or storage. The tenant of the Canton Restaurant sent a messenger to the defendants with a request that a lorry should be sent to the restaurant in the morning for the purpose of taking the furniture in the restaurant to some auction rooms. The defendants asked the messenger whether porters would be required to load and unload the furniture into and out of the van and they were told that no porters would be required: consequently at the time arranged they sent a one-ton lorry, driven by a man named Hawkins who, when he saw the furniture, said that his lorry would not hold the whole of it; and thereupon he went back to the defendants' garage, which was quite close, and procured another lorry to come to the restaurant to complete the removal. The two drivers of the lorries, being willing to assist in the removal of the furniture, went up to the first floor of the building as far as the landing; the pound was in the restaurant and did not extend to the landing;

there were two men in the employ of the tenant, who took the furniture out of the pound and placed it on the landing, whence it was taken by the defendants' two drivers down the stairs and placed in the lorries. It is not suggested that either the defendants or their two drivers knew that the van was being used to remove the furniture from a pound, or that the restaurant had in fact been made a pound. Nor is it suggested that either of the two drivers went into the pound for the purpose of removing the furniture. Therefore it is clear that they did not break the pound; all that the defendants' drivers did was to carry the furniture down the stairs and load it into the vans after the tenant through his servants had broken the pound and placed the furniture outside. Mr. Eddy argued that if the two drivers were held not to be parties to the breaking of a pound in a case like this, any person assisting in a pound-breach by taking away goods out of a pound need only be careful to remain outside the pound in order to escape liability for the pound-breach. If there had been any evidence in the present case that the defendants' drivers had been "careful to remain outside the pound," which expression can only mean that they knew a pound had been created and knowing that fact had kept outside, I should have no hesitation in holding them guilty of assisting the tenant in breaking the pound. In the present case, however, there is no such evidence, and it is proved that while the lorry drivers were willing men and were helping in the removal, they, fortunately for the defendants, did not go inside the pound, and therefore they cannot be held to have broken it; nor can they be said to have been parties to the pound-breach, because it is not suggested that they had any idea that the restaurant was a pound. One of the examples given in the course of the argument seems to me to afford an apt analogy: supposing a pound-breaker were to hail a taxi-cab to the door of a house which had been made a pound, and were then to bring some of the goods out of the pound in a suit-case and ask the driver to place it in the taxi and order him to drive to a station or some other address, could it be said that the taxi-driver was guilty of pound-breaking? Assuredly not. In order to constitute the offence of pound-breaking there must either be pound-breaking in fact or some act knowingly done to assist somebody else to commit a pound-breach. The fallacy underlying the argument of Mr. Eddy is that he confuses an innocent pound-breach, which does not excuse the breaker, with an innocent taking away of goods after the pound-breach has been completed and the goods are out of the pound. For these reasons I agree that this appeal fails and ought to be dismissed.

ROMER L.J. I agree. In my opinion the pound-breach was completed when the goods reached the landing. Macnaghten J. has found that the defendants' servants did no more than carry the goods down from the landing. Up to the time that the goods were placed on the landing the defendants' servants had not, in my opinion, taken any part, active or passive, in committing the offence of a pound-breach. The defendants were no more liable for the pound-breach that was carried into effect than was any person who was passing by the front door at the time the breach was being committed. For these reasons, without going into the other point, on which I desire to add nothing to what has fallen from the other members of the Court, I think that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *R. H. King & Co.; Hobson, MacMahon & Cobbett.*

H. C. G.

VANBERGEN *v.* ST. EDMUNDS PROPERTIES, LIMITED.

C. A.
1933
March 13, 14.

[1932. V. 872.]

Contract—Consideration—Debt—Agreement to obtain amount of Debt and pay it, through another Bank, into Banking Account of Creditors' Solicitors—Obligation of Debtor—Nudum Pactum—Breach of Contract.

Variation in the performance of a promise is no consideration for forbearance by the promisee where in fact it is allowed at the promisor's own request.

The plaintiff, being indebted to the defendants, an agreement was made between him and the defendants' solicitors that, if he would pay the amount of the debt into a bank in the country for the credit of the defendants' solicitors in London, that payment would satisfy all sums which he owed to the defendants, and a bankruptcy notice which they had issued in respect of part of the debt would not be served on him. The plaintiff alleged that he carried out his part of the agreement, but that, in breach thereof, the defendants, by a clerk of their solicitors, served him with the bankruptcy notice.

In an action for damages for breach of the agreement Macnaghten J. held, that, as the plaintiff by the agreement was not to pay his debt to his creditors, but was to pay the money to the account of the defendants' solicitors, which he was not under any obligation to do, there was sufficient consideration to prevent the agreement being nudum pactum and the plaintiff was entitled to maintain an action for breach of the agreement.

On appeal :—

Held, that on the evidence the concession made by the defendants as to time and place of payment of the debt was entirely to oblige the plaintiff and that no benefit thereby accrued to the defendants; and that, that being so, the agreement was a mere nudum pactum and gave no cause of action for breach of contract.

Foakes v. *Beer* (1884) 9 App. Cas. 605 applied.

Decision of Macnaghten J. [1933] 1 K. B. 345 reversed.

APPEAL from a decision of Macnaghten J. on the further consideration of an action tried by him with a special jury. (1)

In July, 1932, the plaintiff, a business man trading in London, was indebted to the defendants in the sum of 208*l.* odd for costs under judgments and an order which had been obtained by the defendants against him in April and May, 1932.

By his statement of claim the plaintiff alleged that on July 6, 1932, the defendants, by a Mr. Kennard, their solicitor, of the firm of Messrs. Stanley Evans & Co., verbally agreed with him that, if he would on July 7, 1932, pay the 208*l.* in cash into a bank at Eastbourne for the credit of Messrs. Stanley Evans & Co. at the Law Courts branch of the Bank of England, that payment would satisfy all sums which he owed them, and a bankruptcy notice which they had issued on June 4, 1932, in respect of 140*l.*, part of the debt, would not be served on him. On July 7 the plaintiff paid the 208*l.* to the Midland Bank, Eastbourne, with instructions to remit it to the credit of Messrs. Stanley Evans & Co. with the Law Courts branch of the Bank of England. The plaintiff alleged that, on July 7, he advised Messrs. Stanley Evans & Co. of the payment, and that, on July 8, he informed the defendants' clerk thereof, but that, in breach of the agreement, the defendants, by a clerk of their solicitors, served him with the bankruptcy notice within the knowledge of two business associates of his. He claimed damages for the alleged breach of contract.

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(1) [1933] 1 K. B. 345.

The defendants denied that the alleged agreement was ever made, pleaded that, if it were made, there was no consideration for the making of it, and denied that the plaintiff had suffered damage.

The jury found that the alleged agreement was made, and returned a verdict for the plaintiff, assessing the damages at 500*l.*

On the further consideration of the action, Macnaghten J. held that as the plaintiff by the agreement was not to pay his debt to his creditors, but was to pay the money to the account of the defendants' solicitors, which he was not under any obligation to do, there was sufficient consideration to prevent the agreement being nudum pactum, and the plaintiff was entitled to maintain an action for breach of the agreement. He also held that, the service of the bankruptcy notice having been effected within the knowledge of two business associates of the plaintiff, the defendants were liable to the plaintiff in substantial, though reasonable and temperate damages.

The defendants appealed. The appeal was heard on March 13 and 14, 1933.

On the appeal the only question argued was as to the sufficiency of the consideration for the agreement, as, on the view which the Court took on that point, the question of damages did not arise.

Hon. S. O. Henn Collins K.C. and *G. O. Slade* for the appellants. The judge was wrong in allowing the question whether there was any contract at all to go to the jury. Assuming, however, that there was in form a contract there was, it is submitted, no consideration to support it.

A debtor is bound to seek his creditor, and there was nothing in this case added to the debtor's obligation by allowing him to pay the debt at Eastbourne which should operate as a consideration. The judge seems to have held that allowing the debtor to pay at Eastbourne was a concession to the creditors and therefore a consideration given by the debtor.

On the contract as proved there was no breach established. The creditors did not serve the bankruptcy notice before noon on the Friday, and the contract did not provide for anything that should happen after that day.

The last point of importance is as to the measure of damages for breach of the alleged contract.

[LORD HANWORTH M.R. We will reserve that question until after we have heard Mr. Comyns Carr on the question of nudum pactum.]

On that point the case is, it is submitted, covered by the decision of the Court of Appeal in *Foakes* v. *Beer*. (1) It was there held that an agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs and on condition of his paying to the creditor or his nominee the residue of the instalments the creditor would not take any proceedings on the judgment, was a nudum pactum, being without consideration, and did not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest on the judgment.

Comyns Carr K.C. and *B. L. A. O'Malley* for the respondent. *Foakes* v. *Beer* (1) has no application to the present case.

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(1) 9 App. Cas. 605.

The only question there was whether the acceptance by the creditors of the principal sum in instalments was an implied release of the interest on the judgment debt.

The telephone conversation here merely amounted to an offer which might have been withdrawn at any time. It became a contract only when it was accepted and acted upon by the plaintiff. The plaintiff did not undertake that he would get the money but that he would try to do so. Paras. 2 and 3 of the statement of claim must be read together as constituting the agreement.

[LAWRENCE L.J. The judge in his summing-up does not refer to the pleadings.]

[LORD HANWORTH M.R. Your real difficulty is as to nudum pactum.]

As to that point the evidence shows :—

(1.) that the plaintiff was to pay the defendants' solicitors and not the defendants themselves ;

(2.) that he was to go to Eastbourne to get the money ;

(3.) that he was to utilize a particular procedure of payment into a bank at Eastbourne;

(4.) that the bankruptcy notice was not to be served upon him ; and

(5.) that he was to pay a larger sum than that which could have been enforced by the bankruptcy notice—namely, 208*l*. instead of 140*l*.

Pinnel's Case (1) was the basis on which *Foakes* v. *Beer* (2) was founded. In *Pinnel's Case* (1) it was decided that payment of a less sum on the day in satisfaction of a greater could not be any satisfaction for the whole. But the value of the satisfaction is not material. The payment of a less sum at a different place would be a satisfaction, as the debtor would thereby be put to trouble and expense to which he would not otherwise be put.

[LORD HANWORTH M.R. I do not think we can go behind *Foakes* v. *Beer*. (2) Can there be any consideration in paying at Eastbourne ?]

(1) (1602) 5 Co. Rep. 117 a.

(2) 9 App. Cas. 605.

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The plaintiff was under no obligation to go to Eastbourne to try and borrow the money from a particular person. He was under no obligation to pay the money to Kenward instead of the defendants. He was extending the bankruptcy notice to something to which it did not apply.

For other examples of a possibility of benefit to creditors: see *Reynolds* v. *Pinhowe* (1); *Curlewis* v. *Clark* (2); *Sibree* v. *Tripp* (3); *Wilkinson* v. *Byers* (4); *Bidder* v. *Bridges*. (5)

No reply was called for.

LORD HANWORTH M.R. This appeal must be allowed. It raises an interesting point in old law which has been admirably presented to us by counsel on both sides. The question is really whether an agreement which was found to exist by the jury, and on which they awarded damages, can be allowed in law to be a valid agreement entitling the plaintiff to sue for a breach.

The facts on which the point arises may be summarized quite shortly. The plaintiff in the action, Mr. Vanbergen, was the tenant of the defendants in respect of some property which was let to him at the rent of 1800*l.* a year. The premises so let were unoccupied, for the plaintiff had failed to secure an under-tenant for them, and from time to time as the rent became payable Mr. Vanbergen found himself in the unpleasant position of having to find the money. In the result certain actions were brought successively against Mr. Vanbergen by the defendants to this action. By June, 1932, payment had been made of the actual sums for which judgment had passed, but there remained outstanding a certain amount of costs in respect of several actions, and on June 16, 1932, the solicitors for the defendants wrote to the solicitors for Mr. Vanbergen as follows: "We have now completed the taxation of the plaintiffs' costs of the various actions, and there is payable by your client in respect of same 208*l.* 6*s.* 3*d.* made up as follows: Costs of first action, 29*l.* 17*s.* 11*d.*; costs of counterclaim of first action,

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(1) (1594) 1 Cro. Eliz. 429.

(2) (1849) 3 Ex. 375.

(3) (1846) 15 M. & W. 23.

(4) (1834) 1 Ad. & E. 106.

(5) (1887) 37 Ch. D. 406, 416.

140*l.* 8*s.* 5*d.*; costs of second action, 11*l.* 9*s.* 4*d.*; costs of third action, 26*l.* 10*s.* 7*d.*; total, 208*l.* 6*s.* 3*d.* We shall be obliged by your writing and obtaining from your client a cheque for this amount, and trust to receive same not later than Monday next the 20th instant." In reply to that, on the 18th Mr. Hodgkinson writes to say that his client is away for the week-end and hopes to be in a position to communicate about the middle of next week. Then, on June 25, quarter day, Messrs. Stanley Evans & Co. write: "We beg to remind you that a further 450*l.* is now due from you for rent up to the 24th instant in respect of the above premises, and unless same is paid in the course of Tuesday next, the 28th instant, our instructions are to take steps to recover same." The 450*l.* was paid, and on July 1 Messrs. Stanley Evans & Co. wrote to acknowledge receipt of the cheque for 461*l.* 5*s.*, being the quarter's rent of 450*l.* plus costs, and pointed out that 208*l.* 6*s.* 3*d.* was still due for costs of the three actions, and added: "In consideration of the present payment we will not take any steps to enforce payment of the above-mentioned sum"—that is the 208*l.* 6*s.* 3*d.*—"until the 7th instant." On the 6th Mr. Vanbergen wrote to the defendants: "On the matter of the costs due, I told Mr. Hodgkinson that I was unable to arrange for sufficient money to pay them, but I hope to pay you by Friday next, the 8th, and will do everything possible to be within the time you allow paying through the bank suggested as discussed this afternoon. I am sorry to delay you. These liabilities are putting me into grave inconvenience and trouble." That refers to a discussion which had taken place that afternoon, July 6. It will be observed from the letter of July 1 that the creditors were holding their hands until the 7th, but on the 6th a telephone conversation took place and this action is founded on what was agreed at that time.

It is said that an agreement was made by Mr. Kennard, the representative of Messrs. Stanley Evans & Co., with Mr. Vanbergen to the effect that Mr. Vanbergen should be given time to pay until Friday, July 8, and the money should be transmitted to the Law Courts Branch of the Bank of England, where the account of the creditors was kept, and that it should be remitted by a payment which was to be made at Eastbourne, and if that sum was paid in on that day then no steps would be taken in the meantime. The terms are not very clear, but the substance appears to be this: we have already agreed, as an act of grace, that we will not take any steps against you until July 7; but we will extend that time until July 8 if you will pay cash to us and we receive that money, which must be paid by you and received by us on July 8. If you do that we will not take proceedings on the 8th; we will wait until 12 o'clock on that day and stay our hand. Now "stay our hand" meant this: they had issued a bankruptcy notice in respect of a portion of the 208*l.* then due—namely, for a sum of 140*l.*, and it was possible for them to serve the bankruptcy notice upon Mr. Vanbergen.

In fact, what happened was that Mr. Vanbergen went down to Eastbourne; he was successful in obtaining money with which to make the payment, and in fact he did pay the money which he had received—208*l.* 6*s.* 3*d.*—on the afternoon of the 7th into the Midland Bank at Eastbourne for the purpose of being immediately transmitted to the Law Courts branch of the Bank of England in London. It was paid in in cash so that there could be no question of clearing the cheque or the like. A letter written on that day by Mr. Vanbergen to Messrs. Stanley Evans & Co. to advise them of the payment failed to reach their place of business in London. Not knowing that the money had been paid in Messrs. Stanley Evans & Co. thought they had the right thereupon to remove the stay and to proceed. The consequence was that they sent a clerk round and he found Mr. Vanbergen at his place of business, and after 6 o'clock upon Friday, the 8th, he served on Mr. Vanbergen this bankruptcy notice requiring the payment of the 140*l.* 8*s.* 5*d.* within the usual time limit. At the time when that was served upon Mr. Vanbergen, Mr. Vanbergen and the server were in the office of Mr. Vanbergen together. Apparently the door was partly open and a certain Mr. Cole, who was paying a visit to Mr. Vanbergen at the time, was cognizant of what was taking place inside the office, and he heard the nature of the communication which was made by the server to Mr. Vanbergen. Mr. Cole gave evidence that it was of such an important nature that whereas before that time he would have been prepared to give Mr. Vanbergen credit up to 1000*l.*—they were both in what is called the soft goods trade—after knowing some difficulty had occurred in reference to which a bankruptcy notice had been issued, Mr. Cole was not prepared to deal with Mr. Vanbergen except upon the basis of cash. In consequence of this service of the notice no immediate step was taken by Mr. Vanbergen, but on July 15, that is a week afterwards, Messrs. Stanley Evans & Co. wrote to him saying: "Referring to the bankruptcy notice served on you herein we have to-day ascertained that on the 8th inst. there was paid into our account at the Law Courts Branch of the Bank of England the sum of 208*l.* 6*s.* 3*d.*, whether in cash or by cheque we do not know. We received no advice of this payment from you or your solicitor, neither did our bankers advise us of it, and it was only to-day when we obtained our pass book from the bank that we knew of the payment into our account. We therefore enclose you formal receipt." The receipt is sent, and without any notice or claim before action, on July 28 this action was commenced.

The action was for the purpose of establishing a claim that the defendants had committed a breach of the agreement made on July 6, and the statement of claim stated that: "The defendants by their solicitor Mr. Kennard verbally agreed with the plaintiff that if the plaintiff would on the 7th day of July, 1932, pay into any bank at Eastbourne the sum of 208*l.* 6*s.* 3*d.* in cash for the credit of Messrs. Stanley Evans & Co., the defendants' solicitors, at the Law Courts branch of the Bank of England, such payment would satisfy all sums which the plaintiff owed to the defendants, and the bankruptcy notice which they had issued on June 24th, 1932, for 140*l.* 8*s.* 5*d.* would not be served on him. On July 7th, 1932, the plaintiff duly paid 208*l.* 6*s.* 3*d.* to the

Midland Bank, Eastbourne, with instructions to remit such sum to the credit of the defendants' solicitors, Messrs. Stanley Evans & Co., with the Law Courts agency of the Bank of England and by letter posted on such date advised the defendants' solicitors of such payment. On or about July 8th, 1932, the plaintiff orally informed the defendants solicitors' clerk of such payment, but in breach of the said agreement the defendants by such solicitors' clerk served the plaintiff with the said bankruptcy notice within the knowledge of two business associates of the plaintiff. By reason of the said breach of agreement the plaintiff has suffered damage." The action was tried before Macnaghten J. with a jury. The jury found in favour of the plaintiff, and they found that the damages for the breach of this agreement were 500*l.* The learned judge gave a considered judgment and ultimately entered judgment for the plaintiff for the 500*l.*, and from that judgment the appeal is brought to this Court.

Now it will be observed that the action is based solely upon this agreement. It is not framed in the form in which it might have been if the facts had justified it—namely, for maliciously taking or initiating some proceedings which were unfounded, analogous to what is to be found in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (1), but the claim is based solely on this agreement. Some difficulties arise as to what are the damages which would flow from a breach of that agreement, and there are a good number of difficulties which seem to stand in the plaintiff's way. The defendants take the point that the nature of the agreement alleged and charged was such that it was not enforceable in law, but merely a nudum pactum. It is a well established principle that a promise to pay a sum which the debtor is already bound by law to pay to the promisee does not afford any consideration to support the contract. The proposition has been stated in a number of ways. I am reading from the statement in Smith's Leading Cases, 3rd ed., of which the editors were Sir Henry Keating and Sir James Shaw Willes: "The general doctrine in *Cumber* v. *Wane* (2) and

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(1) (1883) 11 Q. B. D. 674.

(2) (1718) 1 Stra. 426.

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the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows: viz., that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum.* But if there be any benefit, or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement." That is dealing with the case where there is to be a smaller sum in lieu of an ascertained sum by agreement, but where there is an agreement to pay the sum due the same principle applies. Lord Selborne, in *Foakes* v. *Beer* (1), the latest case which investigated this principle of the law, deals with it in this way. In that case there was an agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments the creditor would not take any proceedings on the judgment. The question was whether that was a valid agreement or a nudum pactum, and it was held that it was merely a nudum pactum, being made without consideration. There Lord Selborne, in concluding his speech upon the point under consideration, said (2): "What is called 'any benefit, or even any legal possibility of benefit,' in Mr. Smith's notes to *Cumber* v. *Wane* (3), is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal." We have, therefore, to consider whether the agreement that was made here on July 6 was an agreement to do anything else than simply to pay on Friday, July 8, into the hand of the creditors the sum which was already

(1) 9 App. Cas. 605.

(2) Ibid. 613.

(3) 1 Sm. L. C. 13th ed. 384.

ascertained and in respect of which there was not only the legal liability, but a duty enforceable by any mode of execution against the debtor. Was there any sort of advantage, any sort of independent benefit, actual or contingent, of a kind which might be a good and valuable consideration moving towards the creditors ?

I now turn to the evidence in the case, taking it as given without discussing the form in which the contract was originally pleaded. [His Lordship referred to the evidence in detail and continued :] The result of all this is that a concession was given by the creditors that payment might be made up to 12 noon on Friday the 8th. Inasmuch as their debtor was going to Eastbourne for his own purposes, for the service of his own business, they conceded that the money might be paid and transmitted through a bank at Eastbourne, but so that it reached the Law Courts branch of the Bank of England in London before 12 noon on the 8th. That concession was made, both as to the extension of time and as to the place where the money could be paid in, namely at Eastbourne in transit to London, entirely to oblige the debtor. There was no advantage which the creditors could reap out of that mode of payment from Eastbourne. It was not equivalent to payment to a third person at the expense and for the advantage of the creditor ; it was not a direction to make use of the money and the opportunity of a visit to Eastbourne to pay some person to whom the creditor owed money—it was not in that sense equivalent to a negotiable instrument which could be payable at a place where the creditor wanted the money to be paid, but the whole of these terms were a part of the concession given to the debtor, and I find it quite impossible to say that those terms fulfilled the qualification laid down by Lord Selborne, that it is " some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal "—a sort of benefit which the creditor may derive from getting the payment of money.

Macnaghten J., in summing-up, did put the question to the jury in rather a broad form, and we must take it, I think, that the jury so found: "Aye or no, are you satisfied that Mr. Kennard acting on behalf of these defendants entered into an agreement to give Mr. Vanbergen until 12 noon to pay this money and agreed that it should be paid in the way in which it was paid, through a bank at Eastbourne sending the money to the Law Courts branch of the Bank of England. That is all I have to say about the contract." The jury say "Yes" to that, and that is the agreement, a concession entirely in favour of the debtor to which no advantage can be drawn or inferred in favour of the creditor. Macnaghten J. dealt with the question whether the action is maintainable on the ground of the principle of *Foakes* v. *Beer* (1) to which I have referred, and he says: "In the present case the jury, by their verdict, have found that on July 6 Mr. Kennard made an offer that if, on the following day, the plaintiff obtained the money and paid it into a bank at Eastbourne with instructions to remit it to the account of Stanley Evans & Co. at the Law Courts branch of the Bank of England, he would not serve the bankruptcy notice. That offer became a contract when the plaintiff accepted it. The plaintiff, by going to Eastbourne, obtaining the money, and remitting it in the manner suggested, made it a binding contract on the part of Mr. Kennard that he would not serve the bankruptcy notice." I cannot find out of the evidence any facts which support that view or which justify the inference. The words which I have read are plain: it was Mr. Vanbergen who said he was going down to Eastbourne, that he was going down as part of his business, and that he did not think he would be getting back after his business on Thursday in time to pay it on Thursday, and the concession arose out of the question whether or not the debtor could be back in town in time to bring it himself, because he frankly said he was trying to get a little more time. When the creditors found that the debtor had to go down to Eastbourne in any event, then the concession was given by the creditors. But they reaped no advantage; there was nothing moving towards them which could be deemed to be a consideration, with the result that the case is one in which the contract is made, but remains unenforceable in law.

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(1) 9 App. Cas. 605.

In the last case which Mr. Comyns Carr relied upon, *Bidder* v. *Bridges* (1), Cotton L.J. in his judgment said: "If there is anything which can be a new consideration and a new benefit to the person entitled to the larger sum, that will do"—a new benefit to the person entitled. In this case, on the evidence that I have read, I can find no new benefit which enured to the creditor, and under those circumstances this arrangement made on July 6 is a nudum pactum and an action for damages for breach of contract cannot be founded upon it.

The appeal must be allowed and judgment entered for the defendants with costs.

LAWRENCE L.J. I agree. The question in this case is whether there was any consideration for the agreement found by the jury to have been made between the plaintiff and the defendants, or whether that agreement was nudum pactum. In order to answer that question it is necessary to determine first what were the terms of the agreement, and, secondly, was there any consideration for it? Speaking for myself, I have had the greatest difficulty in this case in ascertaining the terms of the agreement. The question to the jury was put in general terms: "You find that the agreement alleged by the plaintiff was made? The foreman of the jury: Quite." The learned judge, on further consideration of the case, came to the conclusion that the jury, by that verdict, had found "that on July 6 Mr. Kennard made an offer that if on the following day the plaintiff obtained the money and paid it into a bank at Eastbourne with an instruction to remit it to the account of Messrs. Stanley Evans & Co. at the Law Courts branch of the Bank of England he would not serve the bankruptcy notice." That finding seems to me hardly to accord with what the jury were asked to find, or what they did in fact find, or what was pleaded in the statement of claim. The plea in para. 2 of the statement of claim was: "That on the 6th of July, 1932, the defendants by their solicitor, Mr. Kennard, verbally agreed with the plaintiff that if the plaintiff would on the 7th day of July, 1932, pay into any bank at Eastbourne the sum of 208*l.* 6*s.* 3*d.* in cash for the credit of Messrs. Stanley Evans & Co., the defendants' solicitors, at the Law Courts branch of the Bank of England, such payment would satisfy all sums which the plaintiff owed to the defendants, and the bankruptcy notice which they had issued on June 24, 1932, for 140*l.* 8*s.* 5*d.* would not be served on him." In summing-up to the jury, the learned judge put the contract in different ways at the commencement of his summing-up and at the end. First in this way: "What Mr. Vanbergen says is that he explained that he was going to Eastbourne where he would get the money, and that then Mr. Kennard wanted cash, and it was arranged that he should send the money to London by paying it into a bank there and remitting it to London to the Law Courts branch of the Bank of England." Then at the end of the summing-up he stated that the question for the jury was: "Aye or no, are you satisfied that Mr. Kennard, acting on behalf of these defendants, entered into an agreement to give Mr. Vanbergen until 12 noon to pay this money and agreed that it should be paid in the way in which it was paid, through a bank at Eastbourne, sending the money to the Law Courts branch of the Bank of England?" All those different versions of the contract leave me in great doubt as to what the real terms were, and I think in order to determine the construction of the agreement—for instance, the last version put by the learned judge to the jury—it is necessary to look at the evidence and to see what the facts were. My Lord has referred to the evidence, and therefore I do not propose to do so again, but I concur with him in coming to the definite conclusion that the effect of the agreement was to give a voluntary indulgence to the plaintiff by agreeing not to serve the bankruptcy notice until 12 o'clock on Friday, July 8, and on the plaintiff stating that he was not sure whether he would be coming back from Eastbourne on the Thursday, giving him the further indulgence by offering to accept the money if he paid it into his bank with instructions to remit it to London so that it reached London on the Friday morning before 12 o'clock. Both those indulgences seem to me to have been purely voluntary indulgences given by the creditors to the debtor. At most, the indulgence given as to the payment of the money in Eastbourne was to give the debtor an option to pay either in the way in which the money ought properly to have been paid, or else if it suited his own convenience to pay it into his bank at Eastbourne. Of course, it is well settled that if the new agreement amounts to a bargain that the debtor should, at his own option, perform the duty as he ought to have done, or perform it in some other way, such an agreement cannot be binding without some new consideration.

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(1) 37 Ch. D. 406, 417.

It follows from what I have said that, regard being had to the evidence and the finding of the jury, there was no consideration for this contract. It seems to me that the case is governed by the principle laid down by the House of Lords in *Foakes* v. *Beer* (1), and, applying that principle to the facts of this case, there was no consideration for the promise not to serve the bankruptcy notice before 12 o'clock on Friday.

In these circumstances it becomes unnecessary to consider the further question whether in any event the plaintiff would have been entitled to more than nominal damages for the breach of the alleged agreement.

For the reasons stated I agree that the appeal should be allowed.

ROMER L.J. I agree. The jury, having returned a verdict in favour of the plaintiff for 500*l.*, must be taken to have arrived at the conclusion that the agreement, sued upon by the plaintiff and alleged by him in para. 2 of the statement of claim, was in fact made. The agreement so stated in para. 2 is in these terms: "On the 6th day of July, 1932,

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(1) 9 App. Cas. 605.

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the defendants, by their solicitor, Mr. Kennard, verbally agreed with the plaintiff that if the plaintiff would on the 7th day of July, 1932, pay into any bank at Eastbourne the sum of 208*l*. 6*s*. 3*d*. in cash for the credit of Messrs. Stanley Evans & Co., the defendants' solicitors, at the Law Courts branch of the Bank of England such payment would satisfy all sums which the plaintiff owed to the defendants and the bankruptcy notice which they had issued on June 24, 1932, for 140*l*. 8*s*. 5*d*. would not be served on him." That being the agreement alleged, and found by the jury to have been arrived at, the question is whether there was any good consideration for such an agreement. It was suggested by Mr. Comyns Carr that the consideration is to be found in, and indeed consisted of, the obligation undertaken by the plaintiff to proceed to Eastbourne and there endeavour to borrow money from somebody—from whom was not stated, but from somebody—of a sufficient amount to enable him to pay this debt of 208*l*. odd, which the plaintiff at that time was owing. In the first place, that is not the agreement alleged, and if it had been the agreement alleged there is no evidence to support such an agreement, that is to say, an agreement that the plaintiff at the request of the defendants should proceed to Eastbourne on any such errand. The evidence, to my mind, makes it perfectly clear what the arrangement come to on July 6 was. It must be remembered that the plaintiff had been given until July 7 to pay this 208*l*. odd, and on July 6 he rang up the defendants' solicitor and explained that he was not able to find the money on the 7th. Mr. Kennard, the defendants' solicitor, was naturally annoyed, but on being pressed by the plaintiff he agreed to give him still further time—namely, up to 12 o'clock noon on the following day, Friday, July 8. He was induced to do that because the plaintiff said he had to go down to Eastbourne on the following day and he hoped when he got there he would be able to raise the money from some other source. Then he explained to Mr. Kennard, who had been insisting on being paid cash in London by 12 o'clock on the Friday, that there would be some difficulty in his getting back from Eastbourne on that day, and thereupon Mr. Kennard pointed out to the plaintiff that there was a very easy way of providing for payment in cash in London by 12 o'clock on Friday—namely, by paying the money into the bank at Eastbourne to the account of Mr. Kennard at the Bank of England. That was the suggestion made by Mr. Kennard to help the plaintiff out of the difficulty. In point of fact, what was done on July 6 was, as pointed out by Lawrence L.J., that Mr. Kennard made two concessions to the plaintiff: one was that he should have up to 12 o'clock to pay cash, and the other concession, if concession indeed it was, was that he should pay in this particular way instead of having to come and pay it personally. In my opinion, there is no consideration for the agreement to give time until 12 o'clock on the Friday, nor for the agreement which the jury find was concluded that if it was paid by 12 o'clock the bankruptcy notice should not be served.

For these reasons I agree that this appeal must be allowed with the consequences that have been indicated by the Master of the Rolls.

Appeal allowed.

Solicitors for appellants: *Stanley Evans & Co.*
Solicitor for respondent: *G. E. Hodgkinson.*

W. I. C.

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SAUNDERS-JACOBS *v.* YATES.

[1932. S. 2812.]

Landlord and Tenant—Agricultural Holding—Breaches of Tenancy Agreement —Holding let or treated as Market Garden—Part of Holding—Agricultural Holdings Act, 1923 (13 & 14 *Geo.* 5, *c.* 9), *ss.* 33, 48, 57.

By lease made in 1904 a private residence at Sunbury, Middlesex with gardens, pleasure grounds, and meadow lands, being about 27 acres in all, was demised to the defendant's predecessor in title for twenty-eight years at a yearly rent of 126*l.* The lessee covenanted to keep the premises in repair and not to commit waste. He also covenanted not to occupy use or employ the premises for any trade except that of a nurseryman, market gardener, florist or farmer, without the written consent of the lessors. The lessee during the term ploughed up the grass land and cultivated it as a market garden. In 1924 the defendant, in whom the term was then vested, let the house and garden on a yearly tenancy, but continued to cultivate the rest of the land as a market garden. On the termination of the lease in 1931, the reversioners brought an action for damages for waste and for declarations that neither the demised premises nor any part thereof constituted a "holding" or "market garden" within the Agricultural Holdings Act, 1923 :—

Held, that the premises, excluding the house and grounds let in 1924, constituted a separate holding under the Act; that they were let upon an agreement in writing made after January 1, 1896, which provided that the holding should "be let or treated as a market garden"; that it was therefore a "market garden" within ss. 48 and 57 of the Act, and that the claim failed.

Decision of Macnaghten J. [1933] 1 K. B. 392 affirmed.

Appeal from a decision of Macnaghten J. (1)

By a lease dated February 29, 1904, and made between the trustees of the Halliford Trust and one Scutt, florist, the trustees demised to him a dwelling-house known as Frith Grange, at Upper Halliford, Sunbury, in the county of Middlesex, with the cottages, stables, coachhouse, cowhouses, buildings, orchards, pleasure grounds, also gardens, paddocks and meadow ground adjoining thereto, and containing 27 acres and 23 perches, for a term of twenty-eight years from December 25, 1903, at the yearly rent of 126*l.* 7*s.* 6*d.*, payable quarterly.

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(1) [1933] 1 K. B. 392.

The lessee covenanted (inter alia) to keep the premises in good and tenantable repair during the said term. He further covenanted not to fell, cut down, or damage any timber or other trees, plants, vines or shrubs, to keep the pleasure grounds in good order, and to prune the vines, fruit trees and young plantations, and that he would not commit wilful or voluntary waste, spoil or destruction on, in or upon the premises, but would use the same in a good and husbandlike manner. The lessee also covenanted that he would at the expiration of the term yield up the premises to the lessors in good and tenantable repair.

There was a further covenant by the lessee not to place additional buildings on the premises other than glasshouses, greenhouses or other erections usually made or used by nurserymen, market gardeners, florists and farmers, and not to occupy, use or employ the premises for any trade, occupation or business whatsoever except that of a nurseryman, market gardener, florist or farmer without the consent in writing of the lessors.

The lessee entered into possession, and at some time during the currency of the lease ploughed up part of the grass land and cultivated it as a market garden. The lessors raised no objection at the time, and, as Macnaghten J. held in his judgment, no such objection could have prevailed having regard to the terms of the lease. In 1914 Scutt made over his interest to the Halliford Nurseries, Ld., a private company, in which the defendant held practically all the shares. Scutt also executed a declaration of trust in favour of the company. The company or the defendant then entered into possession and cultivated the land as a market garden. In 1924 the defendant let the house, Frith Grange, itself "with appurtenances" to one Hirst as tenant from year to year, and this tenancy continued until 1931. But this letting did not include the "gardens, paddocks and meadow ground," which were still cultivated as a market garden by the lessee.

The lease determined on December 25, 1931, when the reversion was vested in the trustees of the Halliford Trust, and the rights and liabilities of the lessee were vested in the defendant.

The plaintiff, Saunders-Jacobs, who sued on behalf of himself and the other trustees of the Halliford Trust, alleged that the defendant or his predecessors had wrongfully and in breach of the above covenant committed waste by ploughing or digging up the permanent pasture upon the paddocks and meadow ground and converting them into arable land, and that the defendant had failed to maintain and keep the demised premises in good and tenantable repair. The plaintiffs claimed a declaration that neither the demised premises nor any part thereof constituted a " holding " or a " market garden " within the Agricultural Holdings Act, 1923. They also claimed damages for the alleged breaches of covenant, and arrears of rent for one quarter. The arrears of rent were admitted by the defendant. The defendant in his defence pleaded that the premises constituted a " holding " and/or " market garden " within the Act of 1923. He also alleged that he had at the plaintiff's request on February 23, 1932, put forward his claims for compensation under the Agricultural Holdings Act, 1923, s. 16, sub-s. 2, and that an umpire had been agreed upon between them in respect of these claims and of the amount claimed by the plaintiffs in respect of the alleged breaches of covenant: and that an arbitrator had been appointed under the Act at the request of the parties; and that the action was not maintainable.

Macnaghten J. held that the premises, excluding the house and grounds let in 1924, constituted a separate holding under the Agricultural Holdings Act, 1923; that they were let upon an agreement in writing made after January 1, 1896, which provided that the holding should "be let or treated as a market garden"; that it was therefore a " market garden " within ss. 48 and 57 of the Act; and that the claim failed.

The plaintiffs appealed. The appeal was heard on March 27 and 28, 1933.

W. Hanbury Aggs and *N. H. Moller* for the appellants repeated in substance the arguments used on behalf of the plaintiffs in the Court below. In addition to the cases there cited they also referred to *Bickerdike* v. *Lucy* (1); *In re Masters and Duveen* (2); *Kehoe* v. *Marquess of Lansdowne* (3); and *James* v. *Cochrane.* (4)

Roland Burrows K.C. and *J. B. Lindon* for the respondent were not called upon.

LORD HANWORTH M.R. We have had a very interesting argument, and I should like to say on behalf of my colleagues and myself that we are much indebted both to Mr. Hanbury Aggs and Mr. Moller for the arguments they have presented to us, which have not lost any force by the fact that we have to decide against the contentions they have put forward with great lucidity.

Now there are difficult questions that arise, because we have to interpret certain sections of the Agricultural Holdings Act, 1923, which is a consolidation Act.

The facts are these. There was an indenture of lease made on February 29, 1904, between the trustees of a certain charity, who are the plaintiffs in the present case, of the one part and Mr. William Francis Scutt, of 87 Mount Street, Grosvenor Square, of the other part. The terms of that lease must be adverted to with greater precision in a few moments. Ultimately the position is this: the defendant was the occupier of these premises down to the time when the lease expired, the lease being for a period of twenty-eight years from Christmas, 1903. When the term had expired the question arose what were the rights of the parties in respect of the dilapidations on the one side, and possible compensation under the Agricultural Holdings Act on the other. This action was brought by the plaintiffs, and they asked for a declaration that the demised premises were not a "holding" within the Agricultural Holdings Act, 1923, and that they were not a "market garden" within the same Act, and they also asked for a certain small sum for rent, and a sum for dilapidations as damages for breach of the

(1) [1920] 1 K. B. 707.
(2) [1923] 2 K. B. 729.
(3) [1893] A. C. 451.
(4) (1852) 7 Ex. 170.

covenant to keep in repair. Now it must be observed that in the statement of claim the first part of the plaintiffs' prayer is for these declarations, that is to say, a declaration which would have established that the plaintiffs were immune from any claim being made by the defendant upon them in respect of compensation payable to him under the Agricultural Holdings Act as a market gardener. The defendant claimed that he was entitled to have the compensation payable to him as a market gardener under the Agricultural Holdings Act, and he stated in para. 4 of the defence: "The plaintiffs or their agents have at all material times treated the said premises as a 'holding' or 'market garden' within the meaning of the said Act and have acquiesced in the said application and appointment of the said arbitrator," and so on, to find out what should be the amount paid. The action was brought before Macnaghten J. There was no question that there was a sum of 31*l.* 10*s.* due as rent; there was no question that there would be some sum, whatever it might be, due in respect of the damages for breach of the covenant to maintain and repair. Upon the claim, therefore, the learned judge gave judgment in favour of the plaintiffs for the 31*l.* 10*s.* for rent, directed that the question of the amount of the dilapidations should be ascertained before the Official Referee to whom he remitted that part of the case, and he also refused to allow the claim that had been advanced—namely, that the plaintiffs were immune from any claim being made against them in respect of the market garden so-called under the Agricultural Holdings Act, 1923. From that judgment the plaintiffs appealed, and the main question that we have had argued is this: Is it right that there should be any claim made by the defendant in this proceeding to have compensation paid to him upon the basis that his holding was a market garden? That is by no means an easy question. We may express our agreement with Macnaghten J. that the sections of this Act are very intricate and difficult to construe, but in spite of that it has to be done.

Now the Act of 1923 defines what is a "holding," and that is to be found in the interpretation section, s. 57. The section begins by telling us what a "holding" does not include; it does not include an allotment garden, or any land cultivated as a garden, for protection was needed to preserve an allotment garden from the incidence of the Agricultural Holdings Act. So, first of all, "holding" is stated not to cover an allotment garden or land cultivated as a garden unless that garden is cultivated wholly or mainly for the purpose of the trade or business of market gardening, but, except as aforesaid, "holding" means any parcel of land held by a tenant which is either wholly agricultural or wholly pastoral, or partly agricultural, and as to the residue, pastoral; and any "holding" means something which is in whole or in part cultivated as a market garden.

Now it will be observed that in that section there are really two sentences which refer to a market garden. In the second part you have included within the definition of "holding" land which is in part or in whole agricultural or pastoral, or which is in whole or in part cultivated as a market garden; we have also in the earlier part of the sentence, in the excluding part, a definition "unless it is cultivated wholly or mainly for the purpose of the trade or business of market gardening." It seems to us that we must put those two sentences in effect together, and that a tenement is within the definition of "holding" if it is in whole or in part cultivated as a market garden, and that means wholly or mainly for the purpose of the trade or business of market gardening. If the land so treated satisfies those two tests then it is a "holding" within the meaning of the Act. Then we come to the definition of a "market garden," and once more that brings us back to the word "holding." "'Market garden' means a holding"—to which I have already referred—"cultivated wholly or mainly for the purpose of the trade or business of market gardening." That seems to me to throw one back to the words to which I have already referred "in whole or in part and wholly or mainly for the purpose of the trade or business of market

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gardening." Putting it quite shortly, and so far as relevant to this case, we have therefore to determine whether or not the land occupied by the defendant was brought within the term "holding," because the land so occupied was, in fact, cultivated wholly or mainly by him for the purpose of the trade or business of market gardening. When one has answered that as a question of fact, then one turns back to see to what that leads, and for that I come back to s. 48, and I find that that section and s. 49, and it may be some others and the Schedule, contain specific provisions as to market gardens. Sect. 48 provides that: "In the case of a holding in respect of which it is agreed by an agreement in writing made on or after the first day of January, eighteen hundred and ninety-six, that the holding shall be let or treated as a market garden," then the provisions of the Act are to apply and certain compensation is to be paid. Now a "holding" means some tenement which is cultivated wholly or mainly for the purpose of the trade or business of market gardening—in whole or in part. That last sentence is material by reason of sub-s. 3 of s. 48, because that declares that "where the land to which such agreement," as is referred to in sub-s. 1, "relates, or so used and cultivated," that refers to sub-s. 2, "consists of part of a holding only, this section shall apply as if that part were a separate holding." Therefore, where you have a holding cultivated wholly or partly for the purpose of the trade or business of market gardening, where you have a holding to which that definition can be applied in whole or in part, then you may sever that part to which that definition applies, and then if you have an agreement in writing that the land so dealt with is let or is treated in the written agreement as a market garden, then the compensation sections apply. I have, therefore, to come back, after that definition, to see whether the facts of this case enable the defendant to overcome those difficulties, or perhaps I might more aptly say, to bring himself within the limits successively imposed which ultimately lead to the payment of compensation.

Here I want to refer to one case which to our minds is of importance. Mr. Moller was good enough to call our attention to *In re Masters and Duveen.* (1) There the Court had to deal with the word "treated" in the earlier Act, and they held that it did not simply mean that the holding should, in fact, be so cultivated as a market garden, but that it meant let by one person as landlord and occupied by the other as tenant as a market garden, and so treated as between them for the purpose of governing their rights. I think it is right to say that the judgments seem to go to this extent, that a mere occupation and a mere treatment of the land by the occupier will not be sufficient to comply with s. 48 as it now stands, and it indicates that there must be an agreement to which that treatment can be referred; but I should myself hesitate to give a definition of all the cases that came within the word "treated," because I think the meaning of that word may have to be interpreted according to the several facts which must come before the Court in successive cases. But, for the present purposes, we have to take this decision as indicating that we ought to find an agreement to treat somewhere before ever the compensation under s. 48 can be obtained.

I now pass to the agreement in the present case, bearing in mind that, as Parke B. said in *James* v. *Cochrane* (2), "we must be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done."

Now the lease was made in 1904 and the defendant, until the expiration of that lease, occupied this land which is comprised in the lease, and the lease bears on its face a map. Save and except this, that in 1924 an agreement was made whereby the house and certain premises closely attached thereto were let off to a Miss Hirst, and from and after that time the holding was split into two, in the sense that the house or residence was in the occupation of Miss Hirst, the rest of the land was in the occupation of the defendant,

(1) [1923] 2 K. B. 729.

(2) (1852) 7 Ex. 170, 177.

and when I say, " the rest of the land," I mean 180, 179, 178, 151, and the kitchen garden which is part, I suppose, of 154 on the map. All the defendant had was that land, and he had not the land which was let off to Miss Hirst in 1924.

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Let me now turn to the lease of 1904. The parcels are: " All that detached cottage messuage tenement and premises formerly known as Lawn Cottage now known as The Grange situate at Upper Halliford in the Parish of Sunbury in the County of Middlesex together with the cottages stables coach-houses cowhouses buildings orchards pleasure grounds and appurtenances thereunto belonging And also "—and I am putting in the word " secondly "—" And also secondly all the gardens grounds paddocks and meadow ground next to and adjoining the before mentioned premises situate lying and being in the Parish of Sunbury "—garden grounds, paddocks and meadow ground. Turning to the map, it will be observed that that is a fairly accurate description of what is not necessary to the amenity of The Grange, but it may be taken as an additional parcel comprised in this lease. Passing on, we find that there is a definite covenant on the part of the lessee that he will, during the term, keep the pleasure grounds and other parts of the premises in good order and shall not and will not use the same other than for the purpose of pleasure and ornament. Once more turning to the map, one can see the importance of that, it is a garden which immediately surrounds The Grange, and which has been indicated to us in photographs; but those words do not seem necessarily apt to what I will call the second parcels, the garden grounds, paddocks and meadow ground. Then the covenant goes on to provide that the lessee " will during the said term keep the gardens "—that is a fresh word that we have not heard of before—" and garden ground belonging to the said dwelling-house well cropped and manured and manage the same according to the approved methods of gardening." Then there is a covenant that he will not erect during the said term any additional buildings or erections on any part of the demised premises other than glasshouses.

greenhouses or other erections usually made or used by nurserymen, market gardeners, florists, and farmers, but will use the same in a good and husbandlike manner; and then he is also to occupy and use the premises and "will not suffer the same to be occupied used or employed except as hereinafter mentioned for any trade occupation or business whatsoever except that of a nurseryman market gardener florist and farmer without the consent in writing of the lessors." Let me pause there for a moment. For many purposes the consent of the lessors in writing would be required for certain users of the land, but this clause definitely means that there is no necessity to ask for the consent in writing of the lessors, if he employs the land and carries on upon it the trade or occupation of a nurseryman, florist, market gardener and farmer. Now does not that in plain language mean, in accordance with the test of Parke B., you have at your volition to determine whether or not you will occupy the land in such a manner as you may please as a nurseryman, market gardener or florist; that is entirely at your will. There is no restriction upon that, and you need not come to your landlords to ask for leave; and, more than that, you have a right to put up any tenants' erections, such as are usually made or used by nurserymen, market gardeners, florists and farmers. And then, finally, to complete it, when the clause for the surrender of the premises is looked at, it will be seen that he is to deliver up in good tenantable repair all those fixtures which are catalogued, the locks, keys, bolts, bars, hinges, wainscots and all the rest of it, and all other fixtures whatsoever except trade fixtures. Now what trade fixtures could there be? It must surely refer to the trade or business of a market gardener which he was able to carry on, in respect of which he could make erections and in respect of which he had a right to take away the erections so fixed. I then ask myself: Was the land so let let for a definite purpose of being used as market garden land, and if not so let, was it treated as market garden land? It seems to me that we have to give a definite interpretation to the word "treated," in addition to the word "let," and if it was not let simpliciter for the purpose of market gardening, and for that purpose only, it was let in such a manner as that it could be treated within the ambit of that indenture as a market garden. Now the learned judge has treated the facts relating to this being a market garden and the business of the market garden being carried on there as beyond controversy, and I think he is right. Lawrence L.J. pointed out in the course of the argument that more than one witness had definitely declared that the land was used as a market garden. It was suggested that it was not the trade or business of market gardening, because the persons who were occupying it were interested in some irrigating machinery, but the purpose for which the irrigation was required was to procure a larger harvest from the land which was used as the market garden.

We find ourselves in agreement with Macnaghten J. that the facts come to this: that, as he found, upon the evidence, there has been for this long period of time the user of this land, apart from this which has been now let as Frith Grange, for the purpose of the trade or business of market gardening, that it is a "holding" in the sense that it is land which has been, in whole or in part, cultivated as a market garden and wholly or mainly for the purposes or trade or business of market gardening, that you may sever Frith Grange from the rest of the land, and so bring into operation sub-s. 3 of s. 48, and then you find that s. 48 is to apply to part of the land to which the agreement relates, that it was a separate holding, and that there was an agreement to treat the land as let as a market garden.

The result is that the plaintiffs cannot establish their right to the three declarations 1, 2 and 3; they are entitled to a declaration that there was one part which constituted a market garden and another part Frith Grange, which was separated from it. It is not the duty of the Court, upon the issue now before it, to determine precisely what was the ambit and limit of Frith Grange; it is sufficient for us to say that Frith Grange was not part of, or used as a market garden, in the sense in which the fourth declaration was asked for. But as to the rest, we are of opinion that the defendant is entitled to his compensation, and the result is that this appeal must be dismissed with costs.

LAWRENCE L.J. I agree, and have nothing to add.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *W. Easton & Sons.*
Solicitors for respondent: *Greenwell & Co.*

W. I. C.

Followed. WARMAN *v.* SOUTHERN COUNTIES, ETC. [1949] 2 K.B. 576

KARFLEX, LIMITED *v.* POOLE.

1933
March 14.

Contract—Hire-purchase Agreement—Bailment of Hire—Option to purchase—Defective Title of "Owners"—Default by Hirer—Title subsequently perfected—Implied Condition as to Title.

The plaintiffs were "hire-purchase dealers." Their business consisted in purchasing motor-cars from the owners thereof for cash and letting them out to would-be purchasers on hire-purchase agreements. At the request of the defendant the plaintiffs purchased a motor from K., and on November 12, 1931, entered into a hire-purchase agreement in respect of that car with the defendant.

In the hire-purchase agreement (the most material clauses of which are set out in full in the body of this report), the plaintiffs were called "the owners" and the defendant was called "the hirer." The agreement provided (inter alia) for the payment by the hirer of a deposit of 95*l.* "in consideration of the option of purchase hereinafter contained." The usual provision was made for the payment of rent by monthly instalments, and it was agreed that if the hirer desired to terminate the hire, or if the owners terminated the hire or retook the car for non-performance of any terms of the agreement, the hirer should pay such sum as, with the deposit and instalments already paid, would make a total of 235*l.* "by way of compensation for depreciation of the said motor."

There was the usual option to the hirer to become the purchaser of the car on completing the payment of instalments totalling with the deposit (which was to become the absolute property of the owners, and for which credit was to be given only in the event of the purchase being completed or the depreciation money becoming payable) 309*l.* 5*s.* 6*d.*, or by payment at any time after the execution of the agreement of the outstanding balance of that amount, "but unless and until such purchase has been so effected the motor shall be and remain the sole and absolute property of the owners, and the hirer a mere bailee thereof."

The defendant paid the deposit of 95*l.* to K., who gave credit for it to the plaintiffs against the purchase price paid by them. The defendant then made default in payment of the first instalment of rent. The plaintiffs retook the car and sued the defendant in the Mayor's and City of London Court for 100*l.* (being the 235*l.* depreciation money, less the 95*l.* deposit, and 40*l.* abandoned to bring the claim within the jurisdiction of the Court). After action brought it was discovered that K. had no title to the car, of which he had obtained possession dishonestly. The car was claimed by the true owners, who were then bought out by the plaintiffs.

The defendant contended that it was a condition of the contract that the plaintiffs were the owners of the car at the date of the hire-purchase agreement, and could give the defendant a valid option of purchase. That condition being broken he contended that he was under no liability to the plaintiffs, and he counterclaimed for the return of the deposit of 95*l.* (which the plaintiffs had never actually received, since it had merely reduced the amount out of which they were swindled by K.).

Judgment having been entered in the Court below for the defendant on the claim and counterclaim, the plaintiffs appealed:—

Held, that on the true construction of the agreement there was an express condition that the plaintiffs were the owners of the motor-car and entitled to give the defendant an option to purchase it; that condition was broken, and the judgment on the claim was therefore right. As to the counterclaim the deposit was expressly stated to be "in consideration of the option of purchase," which the plaintiffs were never in a position to give. The consideration had therefore wholly failed, and the defendant had also rightly succeeded on the counterclaim.

Quaere, whether, if the defective title of the plaintiffs had not been discovered until a number of instalments of rent had been paid and the defendant had had the use of the motor-car for a substantial part of the contemplated period, he could have recovered the whole of the instalments paid without deduction for use and occupation.

Per Goddard J. Apart from the express condition in this agreement, it is an implied condition (and not merely a warranty) of any hire-purchase agreement, that the persons letting the chattel are the owners of it at the date when the agreement is entered into, and not merely that they will become the owners before the option to purchase is exercised. Moreover, the doctrine that a bailee is estopped from denying his bailor's title unless evicted by title paramount does not apply to hire-purchase, where the bailment of hire is coupled with an element of sale.

APPEAL from the Mayor's and City of London Court.

The plaintiffs, Karflex, Ld., were "hire-purchase dealers" in motor-cars, their business being to purchase cars on behalf of customers who were unable or unwilling to pay the whole price in cash. The plaintiffs then supplied the car to the customers on a hire-purchase agreement.

The defendant, Gerald Francis Poole, being desirous of purchasing a motor-car from one Edward King, asked the plaintiffs to finance the transaction. The plaintiffs accordingly bought the car from King, and on November 12, 1931, a hire-purchase agreement was entered into between the plaintiffs (thereinafter called "the owners") of the one part, and the defendant (thereinafter called "the hirer") of the other part. It was thereby agreed that the owners should let to the hirer, who should hire, the car described in the schedule (which was in fact the car bought from King), subject to the terms and conditions therein set out, of which the following were material:—

The hirer agrees:

1. To pay to the owners the sum of 95*l.* on signing this agreement in consideration of the option of purchase hereinafter contained (which option is the subject of paras. 12 and 15 (*b*) hereof), and for which amount credit will only be given in the event of a purchase being effected by the hirer, or compensation for depreciation paid under clause 6 hereof. The said sum hereinbefore mentioned shall become the absolute property of the owners.

2. To pay punctually to the owners without previous demand the monthly rent of 11*l.* 18*s.* 1*d.* for hire of the motor, the first payment to be made on December 12 next, and so on month by month on the 12th day of each month, so long as the hirer sees fit to continue to hire . . . .

6. To pay, should he return the motor under clause 15 (*a*) hereof, or the owners give notice terminating the hire, or retake the motor under clause 8 hereof before the expiration of fifteen months from the date hereof, such further sum (in addition to any sum payable under clause 8 hereof) as with the total amount previously paid under clauses 1 and 2 hereof will equal the sum of 235*l.* by way of compensation for depreciation of the said motor.

Provided, and it is hereby agreed between the parties as follows:

8. (This clause provided that if payments under clause 2 were in arrear and in certain other events not material, it should be lawful for the owners to terminate the hiring and retake possession of the motor, without prejudice to their right to recover rent and/or other moneys payable under the agreement.)

10. The owners not being manufacturers or experts do not supply the motor with or subject to any condition or warranty express or implied as to quality, description, fitness or otherwise . . . .

11. The owners shall be at liberty to place their name-plates or any words or numbers to identify the motor as their property upon any part thereof, and the hirer shall not during the currency of this agreement remove, deface, or in any way interfere with the said name-plates, words or numbers . . . .

12. That neither the option of purchase, nor any other rights or interests under this agreement, nor the motor or any interest therein shall be disposed of or be assignable on the part of the hirer . . . .

The owners agree that:

15. (*a*) The hirer may terminate the hiring at any time by returning the motor to the owners at such address as they may direct, at his own risk, cost and expense, but the hirer shall remain liable for rent up to the date of such return (including apportioned rent for any broken period), and damages, if any, for any breach of this agreement, compensation, if any, under clause 6 hereof, and also any other moneys payable under this agreement.

(*b*) Provided all the terms and conditions of this agreement shall have been strictly performed and observed by the hirer, the hirer may at any time during the hiring become the purchaser of the motor by paying to the owners the difference between the sum of 309*l.* 5*s.* 6*d.* and the amount previously paid under clauses 1 and 2 hereof, together with all other sums (if any) which may then be due under this agreement;

or if the hirer continues the hiring strictly in accordance with all the terms and conditions hereof until a total sum of 309*l.* 5*s.* 6*d.* shall have been paid under clauses 1 and 2 hereof, and all other sums (if any) due under this agreement have been paid, the hirer shall become the purchaser of the motor, which shall thereupon become his sole property. But unless and until such purchase has been so effected the motor shall be and remain the sole and absolute property of the owners, and the hirer a mere bailee thereof.

The deposit of 95*l.* was in fact paid by the defendant to King, who gave credit for it to the plaintiffs when they paid the balance of the purchase price, and no question arose on the fact that the plaintiffs never actually received the 95*l.* The instalment due on December 12, 1931, was not paid, and on December 28 the plaintiffs retook possession of the car. On January 18, 1932, they began proceedings in the Mayor's and City of London Court, claiming 100*l.*, made up as follows :—

Amount due under clause 6 . . .	235*l.*
Less deposit	95*l.*
	140*l.*
Abandoned to bring claim within jurisdiction .	40*l.*
	100*l.*

After these proceedings were started it was discovered that King had no title to the car, which he had obtained dishonestly—he was subsequently convicted and sentenced to four years' penal servitude on a number of similar charges, including this one—from a man who had it under a hire-purchase agreement from the true owners, the Lincoln Wagon Company. On March 9, 1932, the plaintiffs perfected their title by buying the rights of the Lincoln Wagon Company for 78*l.*

The defendant in his particulars of defence denied that any sum was due to the plaintiffs under the hire-purchase agreement. He pleaded that it was an express and/or implied term and/or condition of the contract that the plaintiffs were the lawful owners of the motor-car, and had the right to sell and/or hire it to the defendant and give him a good title. In breach of that express or implied condition, the car was not at the date of the hire-purchase agreement the property of the plaintiffs but of the Lincoln Wagon Company. He therefore denied that the sum of 235*l.* had become due, and counterclaimed for the return of the deposit of 95*l.* as money paid on a consideration which had wholly failed.

The plaintiffs contended that the defendant, as a bailee, was estopped from denying their title, unless and until he was evicted by title paramount—which had not happened. The position was analogous to that of an agreement for sale of goods in futuro, where it was sufficient that the vendor should acquire a title before the time for delivery; he need not have it at the date of the contract.

His Honour Judge Shewell Cooper gave judgment for the defendant on the claim and for 95*l.* on the counterclaim.

The plaintiffs appealed.

The Earl of Halsbury K.C. and the *Hon. Cyril Asquith* for the plaintiffs. A bailee is estopped from denying the title of his bailor except in two cases, neither of which has arisen—namely, if he is evicted by title paramount, or if he sets up a jus tertii on behalf of the tertius, and with his authority: see on this question the article on Bailment by McCardie J. in Halsbury's Laws of England, 2nd ed., vol. i., at p. 773, and especially the judgment of Lord Blackburn in *Biddle* v. *Bond.* (1)

[ACTON J. In a hire-purchase agreement, part of the consideration to the hirer is the assurance that after a certain number of instalments have been paid the property in the chattel will become his. At no time before action brought were the plaintiffs in a position to transfer the property.]

The decision of the House of Lords in *Helby* v. *Matthews* (2) makes it clear that a hire-purchase agreement is not a sale but an option for sale. The position is analogous to that of a sale of future goods under s. 12 of the Sale of Goods Act, 1893, where it is sufficient that the vendor should acquire a title before the time for delivery. He need not possess a title at the date of the contract.

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(1) (1865) 6 B. & S. 225, 232.

(2) [1895] A. C. 471.

[GODDARD J. Under a hire-purchase agreement in this form, the hirer may exercise his option to purchase the next day, if he chooses to pay the balance of the price in a lump sum. If the "owner" has no title he does not give what he is bound to give.]

That, in fact, never arose. It was the defendant who broke the contract, by failure to pay the first instalment.

Beyfus K.C. and *J. C. Lawrence* for the defendant. This is a claim for depreciation of a motor-car which was at no time the property of the plaintiffs while it was in the defendant's possession. All the cases cited by the plaintiffs were cases in tort for detinue or conversion. The plaintiffs' claim here is in contract, and the defendant relies primarily on the words of the agreement as amounting to an express condition. Even if the Court is against us on that, we say that the cases on mere bailment of hire are not applicable to the case of hire-purchase and that there must be an implied condition—or at least a warranty of title.

[ACTON J. Otherwise there is nothing to protect the hirer from a claim by the true owner. Also, if the car was not the property of the plaintiffs, they cannot have suffered damages by its depreciation. But are you entitled to recover your deposit without deduction for use and occupation?]

As to that, there has been a total failure of consideration. The wording of the agreement is important; the 95*l.* was not paid as rent, but was expressly said to be "in consideration of the option of purchase," which the plaintiffs were never in a position to give.

Asquith in reply. Hire-purchase is not a strange class of contract sui generis, and gives rise to no implied terms except such as belong either to an option to purchase on the one hand, or a bailment of hire on the other. There is no authority which says that there is an implied condition as to title in any bailment of hire. The only implied term as to title in an option for purchase is that when the time comes for the option to be exercised the vendor shall have a title.

[ACTON J. Your difficulty is that that time may come at any moment.]

A person with a merely possessory title may suffer damage by depreciation of the article. A possessory title by a finder or even by a wrongful taker may suffice: see *Armory* v. *Delamirie.* (1)

ACTON J. This is an appeal from the judgment of His Honour Judge Shewell Cooper in the Mayor's and City of London Court in an action in which the plaintiffs claimed against the defendant payment under clause 6 of the hire-purchase agreement of November 12, 1931, between themselves and the defendant, the sum of 235*l.* They give credit in their claim for 95*l.* which the defendant had already paid, and the total balance claimed as due to them was 140*l.*, of which they abandoned the excess and reduced the amount which they claimed in the action to 100*l.*, in order to bring it within the jurisdiction of the Mayor's and City of London Court.

The case arises upon facts which are sufficiently simple. The plaintiffs, who describe themselves as hire-purchase dealers, apparently do that which such business firms very frequently do: that is to say, they acquire from some person a motor-car which they buy outright and pay for, and they thereupon proceed to let that car out under a hire-purchase agreement to somebody else; they really stand between the real or alleged owner of the motor-car and the person who wishes to have the car let to him under some hire-purchase agreement.

In the present case we find, accordingly, that Karflex, Ld., the plaintiffs, purchased the car from a man named King, who held himself out as being, and was apparently reputed to be, the owner of this car; and having done that, they then entered into this agreement in a familiar form between themselves and Mr. Poole, the defendant, who was the person who desired to hire this car upon a hire-purchase agreement. That agreement was dated November 12, 1931, and to my mind, as soon as that agreement is read and considered, this case is really at an end.

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(1) (1722) 1 Strange, 505; 1 Sm. L. C., 13th ed., p. 393.

The agreement is expressed to be made "between Karflex, Ld., hereinafter called the owners, which term shall include their successors and assigns, and Gerald Francis Poole, hereinafter called the hirer, which term shall include his executors and administrators." Then it recites that the owners have agreed to let to the hirer this car, which is described as a Riley Nine Saloon Car, with its accessories and so forth, and that agreement is made "subject to the following terms and conditions."

To my mind, all the terms and conditions which follow are of importance in considering that which really has to be determined in this case; that is to say, what the intention of the parties as expressed in this document was at the time the contract was made; but some of the clauses are specially important. [His Lordship read clauses 1, 2, 6, 11 and 15, set out above.] The deposit of 95*l.* was paid by Mr. Poole, the defendant, not to the plaintiffs but to Mr. King.

The agreement having been executed, what happened afterwards was this: there was a default by the defendant in the payment of the first instalment, which fell due on December 12, and thereupon, on December 28, the plaintiffs retook possession of this car, and on January 18, 1932, they launched this action, in which the claim they made was the claim which I have already dealt with.

It appeared, after the date when this action was begun, that in fact Mr. King was not the owner of this motor at all, but that he had come by it by some fraudulent or dishonest means, and that the car was in fact the property of the Lincoln Wagon Company who, on learning of the facts, claimed it. The plaintiffs thereupon settled with the Lincoln Wagon Company upon the basis that the car was the property of the Lincoln Wagon Company; but there is no suggestion that in the terms that they agreed with the Lincoln Wagon Company they settled any claim which that company might have against Poole for trespass or depreciation to the car, their property, by reason of the user which he had been making of it.

When the action came on for trial upon these facts before the learned judge, the points which were contested were in substance these: It was contended on behalf of the defendant Poole that this contract expressed or implied a condition that the plaintiffs, Messrs. Karflex, Ld., were what they expressed themselves to be—the owners of the car; that is to say, the true owners of the car, who were in a position in fact to give an option to the hirer which would be in existence throughout the continuance of the agreement, in certain events to become the owner himself by purchase of this car. It was also contended that there was a breach of that condition and that, by reason of the breach of that condition, not only ought the plaintiffs to fail in the claim which they had made against the defendant, but that the defendant was entitled to succeed on his counterclaim against them for the return of the deposit of 95*l*.

Cases have been referred to in some detail and with some elaboration, quite properly and appropriately, which deal with the principles applicable to what I may describe as ordinary cases of bailment; that is to say, cases of bailment to which no special or exceptional conditions or warranties, expressed or implied, attach. I think that Mr. Beyfus is right in saying that those cases are really not relevant to the decision of the present case, because, as he urges, all that should be looked at is the true meaning, according to its fair and proper construction, of this agreement of November 12, 1931. He says that if due regard be had to the express terms of that agreement, it becomes apparent that it must upon its true construction, according to the intention of the parties, have been a condition that the owners, as they describe themselves, were in fact the owners. He contends that that must be a condition which attached to the contract from the beginning and went to the root of the contract; so that upon a breach of the condition liability on the part of the defendant came to an end. In my view that, which in substance is the view taken and expressed by the learned judge below, is the correct view to take.

With regard to the claim, it is to be observed, as Mr. Beyfus pointed out, that it is in substance a claim for the balance of money, abandoning the excess, which is expressed by clause 6 of this agreement in certain events to become payable by way of compensation for depreciation of the motor. Therefore we are face to face at the outset, apart from the existence of the conditions as to the true ownership of this vehicle, with the fact that this claim is made for depreciation of the motor in question, although it in fact is not and was not the property of the plaintiffs at the time when this contract was entered into, and is a claim quite different from the claim which is commonly present in cases where the consideration of bailment is concerned; that is, cases where the action is either for conversion or detinue. Here it is an action upon the contract—an action for compensation for depreciation to a motor-car which in fact was not, at the time the contract was entered into, the property of the persons who held themselves out to be the owners of it. The agreement throughout seems to me to be designed to express that the plaintiffs hold themselves out to be and are in fact the owners of this vehicle, and in my view it is impossible to resist the conclusion that, according to the true intention of the parties, the whole agreement was conditional upon the plaintiffs being the owners of this vehicle.

Various contingencies which might arise under an agreement of this nature have been discussed in the course of the argument. I do not think it necessary to recall them or to instance them once more; but, having considered this agreement, I think the learned judge was right in the conclusion at which he arrived, and that, so far as the claim is concerned, the appeal against his judgment ought to be dismissed.

With regard to the appeal on the counterclaim, I confess that at some stage of the argument I felt greater difficulty, but I have arrived at the conclusion that here again the judgment delivered by the learned judge was right, and that in the circumstances the defendant was entitled to recover his 95*l.* That seems to me to depend upon clause 1 of this agreement, by which "the hirer agrees to pay to the owners the sum of 95*l.* on signing this agreement in consideration of the option to purchase hereinafter contained." That is, according to the way in which this agreement is expressed, contrasted with payments which are to be made for the hire of the vehicle. The payment of the 95*l.* is there in express terms stated to be in consideration of an option of purchase which in fact, upon the known facts of this case, the plaintiffs were never in a position to give to the defendant at the time when they entered into this agreement, or up to the time when they in fact resumed possession of the car upon default of the payment of the first instalment.

I think, again, upon a true construction of this agreement, that it must be a condition of it that at the time the agreement is entered into the owners are to be in a position to give the option of purchase which may be exercisable at any moment after the agreement comes into existence, and in consideration of which the agreement says the 95*l.* is to be paid. As that was not so, in my view there was a breach of this condition, and upon that breach, as the learned judge has held, the defendant is entitled to claim the return of the 95*l.* So far as the option of purchase is concerned, there was at the time of the signing of this agreement no legal right or power in the plaintiffs to grant any such option of purchase whatever. I am therefore of opinion that the judgment of the learned judge ought to be upheld alike upon the claim and counterclaim, and the appeal is dismissed.

GODDARD J. I agree that the appeal fails. The case is one, especially in view of the argument addressed to us by the appellants, of general importance, and I therefore add a few words. I think myself that the judgment, both as to the claim and counterclaim, can, in the particular circumstances of this case, be supported as a matter of mere construction of the agreement. That, of course, is not a point of general application, but in this particular agreement the plaintiffs, who in fact have no title to this car, are described throughout as the owners of the car. Provision is made for them to be at liberty to place their name-plates and identifying numbers on the motor-car as their property, and they undertake in the agreement an obligation to pass the property in the car to the hirer at any moment after the signing of the agreement if and when he chooses to pay the full amount of the purchase price, whether by means of instalments or by a lump sum, which he has an option of doing.

In those circumstances it seems to me that there is a condition in this contract that the plaintiffs are the owners of the car: it is not a matter of warranty, it is a condition. It must be, in my judgment, a condition that they are the owners of the car with which they purport to deal in this manner by hire-purchase. That would be sufficient to deal with the claim, but, having listened to the argument of Lord Halsbury, I think it is desirable to state that in my judgment where a person is letting out chattels of any description on hire-purchase, he does thereby impliedly contract, not that he will at some time become possessed of that property during the currency of the agreement, but that he is the owner of the property at the time when he lets it out.

Lord Halsbury has contended that the doctrine is perfectly well known that a bailee is estopped from denying his bailor's title to the goods, except when evicted by title paramount, and that that applies to a case of hire-purchase equally with any other bailment. In my judgment, that is not so. The doctrine to which he refers is a very old doctrine: it appears to have been evolved somewhere about the year 1602 (1), and Lord Halsbury says that if the Court takes the contrary view, they are not only entrenching upon that well known doctrine, but also upon the classification of bailments laid down by Lord Holt C.J. in *Coggs* v. *Bernard*. (2)

Be it so, but it must be remembered that hire-purchase is a very modern development in commercial life, and surely it is a commonplace in commercial law that if one finds commercial men inventing new methods of business and using documents which are, perhaps, unfamiliar at the time when they are first brought into use, but which are invented to meet the requirements of a particular time or peculiar circumstances, the law has to be moulded and developed to meet the commercial developments which are taking place.

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(1) See *Shelbury* v. *Scotsford* (1602) Yelverton, 4th ed., 1792, p. 23.

(2) (1703) 2 Ld. Raym. 909; 1 Sm. L. C., 13th ed., p. 175.

Now it does not seem to me by any means to follow that the doctrines which were applied to ordinary simple bailments in bygone days apply to this modern class of bailment which has in it, not only the element of bailment, but also the element of sale. I say the element of sale, because, of course, it is well known, since the leading case of *Helby* v. *Matthews* (1), that the hire-purchase agreement, as drawn at present, is not a true contract of sale but an option of sale. Therefore it is a contract between the parties which is partly giving an option of sale and partly creating a bailment, and I think one has only to consider that for a moment to see how fallacious it would be to try to fuse that with the hard and fast rules with regard to bailments which were laid down before any contract of hire-purchase was contemplated.

I think we may satisfy ourselves by adopting the words of Blackburn J. in the case of *Biddle* v. *Bond* (2), where he says: "The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount."

The learned judge there refers to an ordinary bailee and to a case where there is no special contract or representation. Those words seem to me to be equally applicable to an ordinary bailor. The ordinary bailor, where there has been no special contract or representation, is doubtless in the position of a landlord whose tenant is not able to dispute the landlord's title until evicted by title paramount; but I do not think that hire-purchase is an ordinary contract

(1) [1895] A. C. 471.

(2) 6 B. & S. 225, 232.

of bailment. The bailor who lets out the goods is not an ordinary bailor, nor is the customer, who agrees to pay these instalments with the hope and intention of becoming the full owner, an ordinary bailee, and there are special contracts and special representations in such an agreement, and I cannot doubt that one special representation is that the bailor is the owner of the goods at the time that he delivers them.

As was pointed out in the argument, if that were not the case, the hotel-keeper who furnishes his hotel on the hire-purchase system, as so many hotel-keepers do, might find himself in the position, while his business was going on and he was regularly keeping up the instalments, of having the whole of the furniture swept out of his hotel by somebody coming in with a title. It is said that he would have a cause of action against the person who sold it to him, but it seems to me that no man in his sane senses would enter into such a position as that except upon the condition that the person who is letting the furniture to him is, at the time he lets, the owner of the property.

Reliance was placed upon s. 12 of the Sale of Goods Act, 1893, and it was argued that just as, under that section, in an agreement of sale contemplating a future transfer of the property, the only implied condition was a condition that the seller, when the time arrived for the transfer of the property, would have a right to sell at that time, there is a similar implied condition here. But s. 12 only applies to cases where in themselves the circumstances of the contract are not such as to show a different intention. In my view the circumstances of this contract certainly show a different intention, apart from the express clause contained in the agreement.

There is only one other matter upon which I have a word to say, and that is the counterclaim. Like my Lord, until I considered with care clause 1, I felt some difficulty in regard to the counterclaim, and apart from the condition in clause 1 I am expressing no opinion as to what might be the position if a person who was not in fact the owner, but who honestly believed he was the owner of property let out on hire-purchase, was faced with a counterclaim by a hirer who had enjoyed the use of the property, we will say, for half the time that the hire-purchase agreement was contemplated to run, to recover all the money he had paid without making some allowance for the use of the chattel. It will be time enough to decide that when the question arises; but in this particular case of a counterclaim dealing with the 95*l.* paid on the signing of the agreement, "in consideration of the option of purchase hereinafter contained," it is perfectly clear that at the time there was no option of purchase possible, and I agree that the appeal here fails in respect of the counterclaim also.

Solicitors for plaintiffs: *Speechly, Mumford & Craig, for Jones & Son, Colchester.*

Solicitors for defendant: *James & Charles Dodd.*

J. W. H.

1933
March 29.

REIDY AND OTHERS v. WALKER AND OTHERS.

Landlord and Tenant — Rent Restriction — Dwelling-house — Recovery of Possession—Limited Company as Tenant—Caretaker in Occupation—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4.

For some years before 1912 the defendant W. had been the tenant of a cottage which came within the Rent Restriction Acts. In 1912 the defendant company, W. & Co., was incorporated and the tenancy was assigned to it. Thereafter, the defendant company continued to be the tenant, and the cottage was occupied by a caretaker. Subsequently, the contractual tenancy was terminated by a notice to quit. In an action to recover possession:—

Held, that a limited company could not be a tenant to whom the Rent Restriction Acts applied, and, therefore, the defendant company was not entitled to the protection of those Acts.

Skinner v. *Geary* [1931] 2 K. B. 546 applied.

APPEAL from West Brompton County Court.

The plaintiffs, Miss Margaret Reidy, Miss Phyllis Blaxland and Miss Kate O'Brien, claimed from the defendants, Sir Emery Walker, Emery Walker & Co., Ld., and Mrs. Margaret Lewis, possession of a cottage and premises known as 16 Upper Mall, Hammersmith, of which premises the defendant company was tenant. The defendants denied that the plaintiffs were entitled to possession of the premises, and pleaded that they (the defendants) were entitled to retain possession thereof by virtue of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925.

For some years before 1912 the defendant Sir Emery Walker had been the tenant of the cottage. In 1912 the defendant company, Emery Walker & Co., Ld., was incorporated, and the tenancy of the cottage in question was assigned to that company. The defendant company had ever since then remained the tenant, and the premises were occupied by a caretaker, the defendant Mrs. Margaret Lewis, for the defendant company. It was admitted that the contractual tenancy had been terminated by a notice to quit, and that the plaintiffs were entitled to recover possession unless the defendants could rely on the protection of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925.

The plaintiffs had purchased the premises in 1928, and they required possession in order to extend an existing hostel for girls. For that purpose it would have been necessary to pull down the cottage, but that was strongly opposed by the defendant Sir Emery Walker, because the cottage was of some architectural and historical interest, having been used by William Morris in connection with his fine-art hand-printing press.

The county court judge gave judgment for the defendants.

The plaintiffs appealed.

C. E. Rochford for the plaintiffs. The county court judge was wrong in giving judgment for the defendants. The Rent Restriction Acts only protect tenants who are actually living in the dwelling-house. They do not operate to protect a limited company. This is shown by the language as well as by the policy of the Acts. For instance, the language of s. 5, sub-s. 1 (*d*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, excludes a limited company from the operation of that section. The section, as amended, provides (inter alia) that: "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless— . . . . (*d*) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself, or for any son or daughter of his over eighteen years of age, or for any person bona fide residing with him. . . . ." Those words cannot refer to a company. The reference to providing alternative accommodation in certain cases suitable to the needs of the tenant and his family is inconsistent with any protection being given to a limited company. In *Skinner* v. *Geary* (1) Scrutton L.J. said: "Romer L.J. said this (2): 'It has frequently been pointed out in the Courts, and it has been pointed out once more by Scrutton L.J. in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home. Where, therefore, when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole.' It is quite true that in that case the facts were that a part of the premises had been taken out of the Act through being used as business premises, the tenant not residing in the other part but having sub-let it. It is contended by Mr. Safford . . . . that the Court has not yet decided what is to happen if there is no sub-letting but the position merely is that the tenant is not in actual occupation of the house. That is true, but I think that in view of the principle as stated in wide terms in the cases to which I have referred it is very difficult to distinguish this case from the previous cases in any logical way. In my opinion this underlying principle has been treated as governing the Acts—namely, that these Acts were passed during war time owing to the scarcity of houses, and the fact that very high rents were being claimed by landlords from tenants led to the intervention of Parliament, which fixed the rents which could be exacted, and in effect enacted that if a tenant paid the rent so fixed he should be allowed to remain in occupation. Parliament was dealing with a tenant who was in occupation and who was not to be turned out; it was not dealing, and never intended to deal, with a tenant who was not in occupation but who wished to say: 'Although I am not in actual occupation I claim the right so long as I pay the rent to retain my tenancy.' If that had been put forward Parliament would have received the suggestion with contempt." Later on, Scrutton L.J. said (1) that for the reasons he had given the Act did not apply to protect a tenant who was not in occupation of a house in the sense that the house was his home and to which, although he might be absent for a time, he intended to return. One object of the Rent Restriction Acts was to provide as many houses as possible at a moderate rent. A man who did not live in a house and never intended to do so was withdrawing from circulation that house which was intended for occupation by other people. "To treat a man in the position of the appellant as a person entitled to be protected, is completely to misunderstand and misapply the policy of the Acts." (1)

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(1) [1931] 2 K. B. 546, 560. (2) *Haskins* v. *Lewis* [1931] 2 K. B. 1, 18.

Morle for the defendants. It cannot be disputed that a company can be a tenant of a dwelling-house. In this case the defendant company had had notice to quit, had received notice to pay an increased rent and had paid it. Clearly, the contractual tenancy had been terminated and a statutory tenancy must have begun. If the defendant company has no right as a statutory tenant, it must be a trespasser. That would be absurd, because it would mean that the company is a statutory tenant for the purpose of paying a rent exceeding the rent which it has contracted to pay, but was not a statutory tenant for another purpose. [He referred to *Hicks* v. *Scarsdale Brewery Co.* (2)]

In *Skinner* v. *Geary* (3) the tenant was a non-occupying tenant. The company in this case is an occupying tenant.

(1) [1931] 2 K. B. 546, 564.

(2) [1924] W. N. 189.

(3) [1931] 2 K. B. 546.

Greer L.J. said (1): "Moreover, a man may remain in possession in law, even if he is not physically upon the premises, if he is occupying the premises by a licensee, and if the county court judge's findings involved that the persons actually in occupation were mere licensees and had no tenancy, I do not think that the order for possession should have been made." The defendant company in this case occupy the house in question by a caretaker. The county court judge was right in giving judgment for the defendants.

Acton J. This is a case which raises a point under the Rent Restriction Acts. The point is whether a company can be a statutory tenant under those Acts, so as to enjoy the protection afforded under s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, against recovery of possession of the premises of which the company is said to be the tenant, except on any of the grounds specified in the sub-sections of that section. The argument advanced that a company may be such a tenant is one which, without reference to the authorities of the Court of Appeal, seems to me, speaking for myself, to be unimpeachable. I should have thought that a company may be in possession and in occupation of premises, including a dwelling-house, through the medium of some caretaker or other occupant to whom is entrusted the duty of living in and, it may be, taking care of some house to which the Acts apply. Mr. Morle says that in this case all the conditions which are necessary in order that a company, as a legal entity, may be within the Acts as a statutory tenant of the house are complied with. He contends that for the purposes of the Acts possession and occupation should be regarded as meaning no more and no less than what such words mean at common law. It appears to me, however, that the Court of Appeal have in a series of cases taken a very different view, and that they have come to the conclusion that the protection afforded by s. 5 of the Act of 1920 has no application save to a

(1) [1931] 2 K. B. 565.

tenant who is in occupation and possession in a certain limited sense. That limited sense is, I think, to be found expressed clearly in the recent decision of the Court of Appeal in *Skinner* v. *Geary*. (1)

I read these words from the headnote of that case: "The fundamental principle of the Rent Restriction Acts being to protect a tenant who is residing in a house, a tenant, to be entitled to the protection of the Acts, must be in personal occupation or actual possession of the premises in respect of which he seeks that protection." Then Scrutton L.J., after reviewing the authorities for the decisions on this point and tracing how this principle has been developed by degrees by the authorities, ends his judgment by saying (2): "For the reasons I have given the Act does not in my opinion apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return, If it were to be held otherwise odd consequences would follow. The appellant in this case has contented himself with living in one house and claiming another. Suppose he had a number of houses. One object of the Acts was to provide as many houses as possible at a moderate rent. A man who does not live in a house and never intends to do so, is, if I may use the expression, withdrawing from circulation that house which was intended for occupation by other people. To treat a man in the position of the appellant as a person entitled to be protected, is completely to misunderstand and misapply the policy of the Acts."

On the facts of the present case, which it is unnecessary to repeat, it has been pointed out that if, in place of the company, Sir Emery Walker had been the person who was tenant of the cottage and had put a caretaker in possession, he would not, on the authority of *Skinner* v. *Geary* (1), have been a person entitled to the protection of the Acts. But it is said that the company is entitled to such protection. To my mind, in the light of what I have just been reading, it is clear that neither this company nor any other company

(1) [1931] 2 K. B. 546.
(2) [1931] 2 K. B. 546, 564.

can be described accurately as a tenant who is "residing" in a house, or who is in personal occupation or possession of the premises of which possession is sought, still less that the house is the company's "home." It is impossible to say, in the light of the decisions in *Skinner* v. *Geary* (1) and *Haskins* v. *Lewis* (2), that this company or any company can be a tenant under the Acts or that the tenancy under which it is a tenant to a landlord can be described as a tenancy to which the Acts apply. I think that so far as this Court is concerned, we are bound by *Skinner* v. *Geary*. (1)

In my opinion this appeal ought to be allowed.

GODDARD J. I agree. The point has never previously come up for decision in the precise form which it now takes. The possession which it is necessary to consider for the purpose of discussing this appeal was considered by the Court of Appeal in 1931. As I read it, the decision in *Skinner* v. *Geary* (1) lays down that the Rent Restriction Acts were intended for the protection of a person's home, not for the protection of some other rights which he may have. Protection of the home seems to be the whole policy and intention of the Acts. This legislation began in the war when it was desired to protect humble occupiers from being turned out of their homes or having rents heavily raised against them. The Court of Appeal lays down the proposition that before a person can become a statutory tenant his occupation must have an essentially domestic quality, and I read the case of *Skinner* v. *Geary* (1) as showing that because a company cannot reside in the sense which is necessary for a statutory tenant its occupation can never acquire this domestic quality. For these reasons I think this appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiffs: *Blount, Petre & Co.*
Solicitors for the defendants: *Lees, Smith & Crabb.*

(1) [1931] 2 K. B. 546. (2) [1931] 2 K. B. 1.

T. W. M.

THE KING *v.* STEPNEY BOROUGH COUNCIL.

Ex parte JOHN WALKER AND SONS, LIMITED.

C. A.
1932
Nov. 25, 28, 29.

Rates and Rating—Derating—Valuation List—Industrial Hereditament—Insertion in Special List by Assessment Committee—Removal therefrom by Quarter Sessions—Appeal by Occupiers to Divisional Court—New Quinquennial List placing Premises in Non-industrial List—No Appeal therefrom—Subsequent Decision of Divisional Court directing Restoration of Premises to original Special List—Request by Occupiers to place Premises on Special List of new Quinquennial List—Refusal of Local Authority—Mandamus—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *s.* 18—*Valuation* (*Metropolis*) *Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 11, 41—*Rating and Valuation* (*Apportionment*) *Act*, 1928 (18 & 19 *Geo.* 5, *c.* 44), *ss.* 1, 4, 7—*Local Government Act*, 1929 (19 *Geo.* 5, *c.* 17), *ss.* 68, 70.

W. & Co. claimed that four hereditaments of which they were occupiers in the metropolitan borough of Stepney should be included in the valuation list as industrial hereditaments in accordance with s. 1, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. The Assessment Committee allowed the claim and put the four hereditaments into the special list of industrial hereditaments. The revenue officer appealed from that decision, and on December 11, 1929, Quarter Sessions allowed the appeal and ordered the four hereditaments to be deleted from the special list. W. & Co. appealed against that decision by way of case stated, and on April 23, 1931, the Divisional Court allowed the appeal, holding that the hereditaments were industrial hereditaments, and ordered that they should be inserted nunc pro tunc in the special list. In the meantime the new quinquennial list was prepared in which the four hereditaments occupied by W. & Co. were put into Part I., the non-industrial list. The new quinquennial list was finally approved by the Assessment Committee on March 19, 1931, and came into operation on April 6, 1931. After the decision of the Divisional Court on April 23, 1931, W. & Co. requested the local authority to transfer the four hereditaments into the special list of the new quinquennial list, but the local authority refused, contending that W. & Co. should have appealed against the new quinquennial list before the list was finally approved, and that the local authority had no power to alter the list after it had been finally approved and come into operation. W. & Co. then applied for a rule nisi for mandamus to compel the local authority to alter the quinquennial list and to transfer the hereditaments into the industrial special list in accordance with the decision of the Divisional Court on April 23, 1931. The Divisional Court discharged the rule. On appeal:—

Held (reversing the decision of the Divisional Court), that notwithstanding W. & Co. might have objected under s. 11 of the Valuation

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& Sons,
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(Metropolis) Act, 1869, to the incorrectness of the valuation list, yet in the circumstances that was not a sufficient, convenient and appropriate remedy. If W. & Co. had made the objection it would have been useless, as the decision at that time must have been given against them, and therefore the rule for a mandamus must be made absolute.

Rex v. *Poplar Borough Council* (*No.* 1) [1922] 1 K. B. 72 applied and followed.

Rex v. *City of London Assessment Committee* [1907] 2 K. B. 764 distinguished.

Appeal from a judgment of the Divisional Court (Lord Hewart C.J., Avory and Humphreys JJ.) discharging a rule nisi for a mandamus commanding the respondents, the Mayor, Aldermen, and Councillors of the Metropolitan Borough of Stepney, to insert in Part II. of the quinquennial valuation list, 1930, certain hereditaments in Assam Street and Commercial Road East.

The appellants, John Walker & Sons, Ld., were at all material times the occupiers of Nos. 2–15 Assam Street and 33–35 Commercial Road East, in the parish of Stepney, and the respondents were the rating authority of that parish.

The following statement of facts is taken substantially from the judgment of Lord Hanworth M.R. :—

By s. 68, sub-s. 1, of the Local Government Act, 1929, it is provided that " The rateable value of industrial hereditaments and freight transport hereditaments shall, for the purposes of valuation lists in force at the appointed day as from that day, and for the purposes of subsequent valuation lists, be ascertained as follows "—and then there are provisions whereby the industrial hereditaments are to be rated at one-quarter of the net annual value thereof. That is a section which clearly gives relief in respect of rates to industrial hereditaments. The words " industrial hereditament " are derived from the sections of the Rating and Valuation (Apportionment) Act, 1928, which was described as " An Act to make provision, with a view to the grant of relief from rates in respect of certain classes of hereditaments, for the distinction in valuation lists of the classes of hereditaments to be affected, and the apportionment in valuation lists of the net annual values of such hereditaments according to the extent of the user thereof for various purposes." Sect. 1, sub-s. 1, provides that "In every valuation list the classes of hereditaments hereinafter mentioned shall, in the prescribed manner, be distinguished from each other and from all other hereditaments, that is to say, there shall be so distinguished—(*a*) agricultural hereditaments; (*b*) industrial hereditaments; (*c*) freight-transport hereditaments." Then sub-s. 2: "Valuation lists which will come into force after the first day of October, 1929, shall be made in conformity with the provisions of this Act; and the principal Act, that is to say . . . . (*b*) in relation to London, the Valuation (Metropolis) Act, 1869." That statute received the royal assent on August 3, 1928, and from and after that date it was the clear duty of the rating authorities in relation to rating to prepare their valuation lists coming into force after the date I have mentioned with the distinction drawn as indicated in this first section. As I have pointed out, this statute is to be fitted on to what is called the principal Act for London, that is to say, the Valuation (Metropolis) Act, 1869.

The dates in the present case are of great importance. The present appellants claimed on October 1, 1928, that is soon after the Act to which I have just referred had come into force, that their premises should be included in the special list which is provided for industrial hereditaments. On July 6, 1929, the reply was received rejecting that claim, and on July 29, 1929, the present appellants gave notice of objection to that decision. On October 10 there was a hearing by the Assessment Committee, who ordered that the appellants' premises should be put into the special list. At that time no one was in doubt as to the purpose for which they were put in the special list, because the Local Government Act, 1929, of which I have read s. 68, came into force on March 27, 1929. Of the two Acts of 1928 and 1929 the latter was complementary to the former and indicated the reason why there had been this distinction. On October 10 these appellants received a satisfactory decision from the Assessment Committee, because they had, on appeal to them, complied with the request and put the appellants' premises in the special list. But on October 26 the revenue officer, who had a right so to do, because the Revenue Commissioners are affected in their collection of the tax under Sch. A, gave notice of appeal to Quarter Sessions, and that appeal was heard on December 10 and 11, 1929, when the appeal of the revenue officer was allowed and the premises were deleted from the special list and put back into the non-industrial list, which would bring them under a duty to pay rates on the full annual value. Now we have got to the end of 1929. In the course of 1930 it became the duty of the rating authority to prepare the new quinquennial list which would run from April 6, 1931, for five years. On June 1, 1930, the list as prepared by the surveyors was transmitted to the Assessment Committee, and in that list one of the four hereditaments occupied by the appellants was put into the special list, the other three were retained in the other part. But the Assessment Committee when that list had been transmitted to them altered the list so rendered to them and put all four hereditaments occupied by the appellants into Part I., that is the non-industrial list. That was not done until late in the year, and it was not until December 30 of that year that a notice to this effect was sent to the present appellants. After the Assessment Committee had approved the list with the alterations I have mentioned the list was redeposited, and on March 19, 1931, the Assessment Committee finally approved the list in which all four hereditaments occupied by the appellants appeared in the non-industrial list. On April 6, 1931, the new quinquennial list came into force. In the meantime an appeal by way of case stated had been brought from the decision of the Court of Quarter Sessions of December 11, 1929. On April 23, 1931, the case stated was heard in the Divisional Court, who held that all the hereditaments occupied by the appellants were industrial, and a decision was given that they should be inserted nunc pro tunc in the special list.

The appellants requested the respondents, the Stepney Borough Council, to make the transfer, but the latter refused.

contending that the appellants should have appealed against the inclusion of their premises in the non-industrial list before the quinquennial list was finally made and, as they had not done so, it was not the duty of the respondents, nor had they the power, to alter the list.

The appellants obtained a rule nisi for mandamus to compel the respondents to transfer their premises to the special list, but the Divisional Court discharged the rule, adopting the views of the respondents as above stated.

The appellants appealed. The appeal was heard on November 25, 28 and 29, 1932.

Sir William Jowitt K.C., *Maurice Healy K.C.*, and *R. T. Sharpe* for the appellants.

Joshua Scholefield K.C. and *Hubert Hull* for the respondents.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. stated the facts as above set out and continued: It will be observed that the appellants' rights were not decided until this decision of April 23, 1931. In December, 1929, there was the decision of the Court of Quarter Sessions against them, and it is said that if they wanted to found proceedings by which the quinquennial list should have been capable of amendment and alteration they ought to have taken steps at a time when during the year 1930 that list had not become a final list to have it reopened and the case determined if possible in their favour. It is, however, to be noted, that, so far as the matter went there had been both a decision of the Assessment Committee and of the Court of Quarter Sessions against the present appellants. There is no doubt that steps had been taken, and were pending, for those decisions to be altered by the hearing in the Divisional Court, but as the matter stood, if an application had been made to the Assessment Committee in the course of 1930 the Assessment Committee could only have determined as they and Quarter Sessions had previously determined—namely, that the hereditaments of the appellants were to be placed in the non-industrial list. The quinquennium, as

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I have said, starts from April 6, 1931. Unless there is an alteration in that list there can be no alteration during the currency of the quinquennium, for the only way in which an amendment of the quinquennial list can be obtained is where there has been an alteration of the premises giving a right to ask for a supplemental list and a consequent amendment of the quinquennial list in the course of the quinquennium. There has been no such alteration in the hereditaments occupied by the appellants, and that right is not available. Hence, unless something is done, the appellants will suffer and be compelled to pay their full rates in spite of the explicit terms contained in s. 68 of the Local Government Act, 1929, that as from the appointed day these industrial hereditaments, as they are now determined to be, ought to pay no more than one-quarter of their rateable value.

The appellants have applied to the Court for a mandamus to compel the appropriate authority to make an alteration in this quinquennial list and put their premises into the industrial or special list in accordance with the decision which was given on April 23 after the quinquennial list had come into force. Objection is taken to the issue of that mandamus on the ground that this is not a case where such a remedy should be given, because there was a sufficient, convenient and appropriate remedy open to the appellants to secure the end which they now seek by a mandamus. Now it is very old law that the Court can by mandamus apply a remedy brevi manu where there is no other remedy of the nature which those three adjectives which I have used imply. In *Reg.* v. *Mayor of Rochester* (1) an order of mandamus was directed not to the mayor who originally made the order, but to his successor, to put right what ought to have been done by revision of the burgess list, although there had been a lapse of time beyond which it was impossible to correct an error. In *Reg.* v. *Victoria Park Co.* (2), to which our attention was drawn by Mr. Hull, Lord Denman summarizes the matter thus: " It was argued that we have

(1) (1857) 7 E. & B. 910; (1858) E. B. & E. 1024.

(2) (1841) 1 Q. B. 288, 291.

issued the writ, even where there was a legal remedy, in cases where that remedy was not so complete and beneficial as the writ would enforce. But that has been where the remedy at law was not *in its nature* so complete, without reference to any circumstances peculiar to the case in which it was to be used." Mr. Hull, not unnaturally, relies upon those words "in its nature"; but it seems to me that this remedy, or prerogative right, is one which is available where the Court sees that an effective remedy otherwise is not open and available to the person who seeks the assistance of the Court. It is an old remedy, and it has been laid down in the books, where a number of cases are cited to establish the proposition, that it ought to be granted where there is no other sufficient effective and appropriate remedy, although it may well be said that the right is not of course, and will only be granted in the discretion of the Court where the applicant has not failed to take steps which have been assigned to him by a statute as the process to obtain remedy.

It is said in this case that there was an appropriate remedy which could have been applied. What was that remedy? First of all it is said that s. 18 of the Union Assessment Committee Act, 1862, gives a right to any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation to give notice of objection; and it is said that that somewhat limited right has been extended by s. 11 of the Valuation (Metropolis) Act, 1869, for that section provides that "Objections may be made before the assessment committee by any person authorised by this Act and the Acts incorporated herewith to object who feels himself aggrieved by reason of the unfairness or incorrectness of the valuation of any hereditament, or by reason of the insertion or incorrectness of any matter in the valuation list, or by reason of the omission of any matter therefrom." It will be seen, I think, that that last section does enlarge the scope of s. 18 of the Act of 1862, and by a further section of that Act of 1869 I think we must treat s. 18 as having been enlarged, for by s. 7 there is a definite reference to s. 18, and it is to be introduced and still

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made effective subject to the alterations made by this Act. I am therefore going to assume, and it accords with my present opinion, that there was a right to object and to put the matter in train for decision under the powers reserved to the present appellants by virtue of s. 11 of the Act of 1869. But then one comes to consider the question: Was that a sufficient, convenient and appropriate remedy in the present circumstances? and here I find myself unable to accept the view that it was so. Those words must be words of degree, and I think that the question of what is an appropriate remedy being a question of degree is emphasized by *Rex* v. *Poplar Borough Council* (*No.* 1.) (1), and by the observations that were made by Bankes L.J. and Scrutton L.J. on that case. A remedy was open in that case, but both the Lords Justices take the remedy and consider it in the perspective of the facts as they existed in the case and come to the conclusion (2) that to issue a fi. fa. "to seize the personal goods of the borough council, whether this means goods owned by the council as such, such as water carts, or the personal goods of the members of the council, would be quite insufficient to produce even the first instalment of the precept." That case, to my mind, justifies the Court in saying that you must consider what is a sufficient remedy in the light of the facts that you have to deal with.

It is said that the present appellants, having that right of objection to which I have referred, could have served a notice of objection before the list had been transmitted to the Assessment Committee, that they could have urged that objection before the Assessment Committee, who would have been bound at that time to decide against them, that they could have then taken the case to Quarter Sessions, who had already decided the point against them, and they could have asked that no decision should be reached by Quarter Sessions until another case, not between the same parties but between them and the revenue officer, had been decided; and the Court of Quarter Sessions might have determined, as I have no doubt they did in many cases determine for reasons good and sufficient, to adjourn the case until direction had been obtained on this difficult statute from the superior Court. But when we come to consider whether that was a sufficient remedy so as to exclude the right of the appellants to come to this Court for a mandamus I think we must consider all the surrounding circumstances of the case, and inasmuch as the appellants had not secured the decision in their favour until after the quinquennium had begun I find it difficult to impute to the appellants a mistake, or a failure to exercise their remedy which, at the time they exercised it, must have been determined against them, and which could only have been taken at some expense and on the chance of there ultimately being a decision given in their favour by the superior Court.

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(1) [1922] 1 K. B. 72.

(2) Ibid. 92.

But it is said that the point has been really already decided, and that the Court of Appeal in *Rex* v. *City of London Assessment Committee* (1) had in circumstances not much dissimilar from those in the present case, decided that it was not right to grant a rule for a mandamus. To my mind it is of great importance to note the facts in that case. The question which there arose was whether or not an Assessment Committee should respond to the claim of the Corporation of the City of London and insert in the column for rateable value figures which had so far never been inserted in the ratebooks, because up to that time it had been always assumed that the particular area was not in fact rateable. The City of London, however, were anxious to have the opportunity of having this area inserted as a rateable area for the purposes of the rate which they were preferring—I think it was a sewer rate. The Corporation served upon the clerk to the Assessment Committee, who had declined to insert those values in the rateable column, notices of objection to the valuation lists which so far the Committee had prepared. The Overseers of one parish complied with the request and inserted the figures; the others made a protest. The Corporation of the City of London apparently communicated with the Assessment Committee. The latter body said that

(1) [1907] 2 K. B. 764.

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they would prefer not to amend the lists, but that the Corporation could apply for a mandamus which the Assessment Committee would not oppose. That was all very well for the two bodies so far concerned, but inasmuch as other parishes were concerned and would suffer by the rateable value being inserted it was open to them as aggrieved persons by their Overseers to complain of any decision of the Assessment Committee which should insert their rateable value in the rateable column, and as aggrieved persons they took steps. An application for a rule nisi was made on July 31, 1905, and the rule nisi was granted, directed to the Assessment Committee of the City of London calling upon them to show cause why a writ of mandamus should not issue commanding them to insert in the quinquennial valuation lists the gross and rateable values of the hereditaments in these four parishes. It will be observed that at that time it was possible to appeal from the Assessment Committee to Quarter Sessions. An appeal would have been heard some time in January, 1906. But that step was not taken. I have obtained the original of the order nisi, which, curiously enough, although obtained on July 31, was not drawn up until November 24, and the day fixed for the hearing of the case was Monday, December 4, 1905. It was heard, apparently, on that day, but the judgment was not delivered until May 17, 1906, when the two learned judges in the Divisional Court, Lord Alverstone C.J. and Bray J., differed in opinion. Bray J., being the junior judge, withdrew his judgment, and the case went forward to the Court of Appeal, where it was heard in April, 1907. But all the proceedings went back to the question whether or not the Corporation of London was entitled to obtain an order absolute for a mandamus based on the order nisi granted on July 31, 1905. It was held by the Court of Appeal that inasmuch as there was another path by which the appellants could have sought and obtained relief and remedy this prerogative writ ought not to issue, and it is plain when one looks at the facts that there was no reason for applying to the Court for this writ. The ordinary procedure which is provided by the

Act of 1869 could have been followed, and a decision could have been reached, but the appellants did not take the trouble to test it at all. In the present case it is otherwise. In the present case the appellants had taken steps to test the decision of the Assessment Committee. They had carried it as far as Quarter Sessions, and further, by the special case, but they had not obtained the decision upon the special case by the time the new list came into force. If and when the decision is given upon the special case abundant means are provided whereby that decision is to be treated as nunc pro tunc and to be brought back effectively into the scheme of rating which was ordered to be amended by that decision. There is no difficulty at all about that. It seems to me that it would be to misunderstand the *City of London Assessment Committee* case (1) to say that that case applied to the present, for its facts take it so far away from a case where the applicants have tried to help themselves and were in the course of helping themselves and were entitled, as I think, to come to the conclusion that it was unnecessary to take further proceedings. On the other hand there are the plain words of the Acts of Parliament to which I have referred. Can it then be said that during the next five years by reason of not having taken some step in the face of and in defiance of the order of the Assessment Committee and of Quarter Sessions the appellants have no remedy, and that s. 68 of the Act of Parliament is to be left inoperative during the remainder of this quinquennial period?

The Divisional Court in the present case in a short judgment held themselves bound by the decision in the *City of London Assessment Committee* case. (2) As so often happens in the Court of Appeal we have had a much better opportunity of considering that case than was afforded in the Court below, and as I have already indicated I cannot consider that case as conclusive of the present case. Vaughan Williams L.J. towards the end of his judgment says that one reason against the granting of mandamus is that it would have shut out the rights of the aggrieved persons who were at

(1) [1907] 2 K. B. 764.

(2) Ibid. 787.

that time taking steps, or were anxious to take steps to prevent the Assessment Committee acceding to the request of the Corporation of the City of London. He says (1): "I need only add that I have felt predisposed to come to this conclusion, because at present I am unable to see any clear course which would be open to the appellants if the mandamus were to go and the assessment committee were to amend the valuation list by the insertion of the various figures in their appropriate columns; I do not see how the ratepayers who might be aggrieved thereby would have any remedy, the time for an appeal by them having long gone by." Fletcher Moulton L.J. says (2): "That being so, the rating authority, having neglected to avail itself of that procedure, cannot apply for a mandamus to the assessment committee to correct its valuation list; its proper course was to enforce the correction, or perhaps I should rather say the due completion, of that list by means of the procedure provided by the statute." I repeat, for the purpose of emphasis, that the present appellants were seeking, and had taken steps to have determined, the question before us that these were industrial hereditaments. All that can be charged against them is that they did not take inchoate steps to alter a decision which could not, as matters stood, be altered. That is all that can be said. Yet it is argued that the law is powerless to provide any remedy to make the present quinquennial list comply with and accord with s. 68 of the Act of 1929. I think that the mandamus ought to go, and I think it ought to go in a simple form which will, I hope, avoid some of the difficulties which have been referred to by Mr. Scholefield. Sect. 45 of the Act of 1869 says "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted" and so on. If, therefore, we direct the alteration to be made in the valuation list for the time being in force that direction will have the virtue which is given to it by s. 45 of the Valuation (Metropolis) Act, 1862.

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(1) [1907] 2 K. B. 787.

(2) Ibid. 793.

I will only add one word. It is suggested that there never was a duty on the part of the rating authorities to put this matter right, and attention is called to the terms of s. 70, sub-s. 4, of the Act of 1929. I think the answer that was given by Sir William Jowitt on that point is effective. When once you have obtained an order which is to be taken nunc pro tunc then all that happened after that time—and the tunc in that case was before the quinquennial list was made up—must be the duty, or what is to be deemed to be the duty, of following out the order of the Divisional Court, and inasmuch as that duty was not complied with steps must be taken now to amend the list, once more, nunc pro tunc.

For these reasons I think the appeal must be allowed.

SLESSER L.J. This is an appeal from a judgment of the Divisional Court discharging a rule nisi for mandamus directed against the Mayor, Aldermen, and Councillors of the Metropolitan Borough of Stepney on the motion of John Walker & Sons, Ld., commanding them to insert in Part. II. of the Quinquennial Valuation List, 1930, certain hereditaments in the possession of John Walker & Sons, Ld.

In order that a mandamus may go it is necessary in the first place that those supporting such a rule should show that there is a duty to be performed by those who are to be commanded, and the first question I ask myself, therefore, in the present case is: Was there or was there not such a duty? In my opinion such a duty does exist and did exist at all material times in the Corporation of Stepney to insert in Part II. of the valuation list the name of John Walker & Sons, Ld., in respect of the four hereditaments in question. That duty arises by virtue of ss. 1 and 4 of the Rating and Valuation (Apportionment) Act, 1928. Sect. 1, sub-s. 1, of that Act requires that "In every valuation list the classes of hereditaments hereinafter mentioned shall, in the prescribed manner, be distinguished from each other and from all other hereditaments, that is to say, there shall be so distinguished . . . . (*b*) industrial hereditaments," and in s. 4, sub-s. 1, of the same statute it is provided: "In every valuation list every industrial hereditament occupied and used wholly for industrial purposes shall be shown as being so occupied and used" and so forth.

Then it is provided by s. 7 that certain provisions of the Rating and Valuation Act, 1925, shall apply to London and particularly s. 58 of that Act, which enables the Minister to make rules, and acting under that section the Minister has made rules called the London (Valuation List) Regulations, 1929, which show clearly the industrial hereditaments separately from those hereditaments which are not industrial. The reason for that was proleptically that in 1929 the financial consequences of this description were carried out and, as my Lord has said, by s. 68 of that Act, persons being in the industrial list obtained a considerable abatement of rate. Therefore, in my opinion, a duty was created once it was decided, as it was decided, on April 23, 1931, that the particular hereditaments in question were industrial hereditaments. That was decided by the Divisional Court. No appeal was entered from that decision, and it was a decision by way of case stated to the Quarter Sessions, and it must be treated retrospectively that the Quarter Sessions ought to have regarded the hereditaments as industrial hereditaments from the time when the question first arose.

Now that is the position, and it is really not disputed here that apart from defects of machinery those hereditaments ought in accordance with that decision to have been placed in Part II. of the list. There is no doubt to my mind, having read the affidavits, that there was a refusal here on the part of the Borough of Stepney to perform that duty, and I do not need to add to what my Lord has said, that the recourse which it has been sought to make to s. 70, sub-s. 4, in order to show that nevertheless the borough were precluded by reason of the non-entry of these hereditaments in the earlier

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special list from performing their duty, cannot avail. In my view when once the decision of the Divisional Court was given it must be regarded that at all times these hereditaments were industrial hereditaments dating back from the time of the passing of the 1928 Act, when industrial hereditaments were first created by statute.

There being therefore that duty, and a duty declined, I pass to the question whether there is a want of any other specific and effectual remedy, a remedy equally convenient, beneficial and appropriate. Now on that it is said that there was such a remedy. During the time this quinquennial valuation list was in process of being made up, it is said it was at all times open to John Walker & Sons to appeal from the refusal of the Assessment Committee to place them in Part II. or, in the earlier times, in the special list. I cannot agree with the argument of Sir William Jowitt when he says that there was no power to object under the Acts of 1862 and 1869. In my opinion s. 11 of the Valuation (Metropolis) Act, 1869, which says that "Objections may be made before the assessment committee by any person authorised by this Act and the Acts incorporated herewith to object who feels himself aggrieved by reason of the . . . . insertion or incorrectness of any matter in the valuation list" is wide enough to cover a complaint with regard to being in one Part or another Part of the valuation list. Sir William says: "But that right is limited to a person authorised by this Act and the Acts incorporated herewith to object," to which I think the answer is that the Acts of 1928 and 1929 are to be read as one Act with the Acts of 1869 and 1862, and when it is remembered—and I have already had occasion to point it out when dealing with the performance of duty—that the Act of 1928 requires the valuation list to be so stated that it does show whether a particular hereditament is or is not in the industrial hereditament list, then I think it becomes clear that an objection may be taken under s. 11 of the Act of 1869 by a person who objects to an entry in the list under the Act of 1929 being incorrect.

I start with the assumption, therefore, that such an objection may be made, but I agree with my Lord that that is by no means conclusive for the respondents, for we have to ask whether such a remedy is effectual, convenient, beneficial or appropriate. Many different words have been used, but the meaning and intent of them is the same. The principle of the Court—and it is a matter of discretion to be considered in the circumstances of each particular case—is whether there is an existing remedy which may and ought properly to be employed, and which could have been properly employed, such that the high prerogative writ of mandamus will not be used.

In my opinion, therefore, there was in this case ample reason why the persons affected here should not have urged their objections ; at any rate, it cannot be contended that their failure to urge an objection was such that it can be said that they have refused to use an appropriate remedy. They were in this position, that at the time when it was appropriate for them and when they were within time to make their objection on the compilation of the quinquennial valuation list, they had a decision from the Quarter Sessions stating that they were not an industrial hereditament, and to say that a person is required to appeal on a ground which, taking the law as it is at the moment, has been decided to be a bad ground, seems to me to call for more sacrifice in the direction of producing litigation than it is fair to call upon any layman to suffer. So far as was known at that time, John Walker & Sons had they pursued their appeal would inevitably have lost their case, but so stood the law. It seems to me beside the point to argue that a case might or might not have been ultimately taken to the Divisional Court. It might never have been heard ; it was, in fact, carried on by the revenue officer and not by the persons to whom they were making objection. I think the appellants were entitled to take the law as they found it at the time, and having a decision that they were not an industrial hereditament they were entitled at that time I think to stay their hands. At any rate I am quite clear that such a remedy by way of appeal would not have been appropriate or effectual.

On that Mr. Hull has raised, if I may say so, with respect, a very ingenious argument. He has said, as I understand him, that this whole test of the appropriateness and convenience and the like is not to be directed to the particular circumstances of the particular case, but is to be regarded from the point of view of the remedy, and as it cannot be denied here, once Sir William Jowitt's argument on the section of the 1869 Act does not prevail, that there was here a power to appeal, he says that it is beside the point that it might be foolish or inappropriate for those persons to appeal in the face of an adverse decision. But, in my view, that argument, which I think finds perhaps a shadow of support in certain observations in *Reg.* v. *Victoria Park Co.* (1), to which we were referred, is dealt with in the case of *Rex* v. *Poplar Borough Council* (*No.* 1.) (2)—a case which as counsel therein I have cause to remember. In that case there was an alternative remedy; certain moneys were sought from the Poplar Borough Council and powers were given to the Overseers to raise the money by distraint. Therefore, if the matter had been limited entirely to an alternative remedy the alternative remedy was there, but it was pointed out that the sum which was owing from the Council was a very considerable sum—I think in all it amounted to about 33,000*l.*—and those who were then Councillors in the Borough of Poplar were not likely on distraint to produce a sum—as I think one of the learned Lords Justices said—sufficient to pay the first instalment.

Now a similar case had been heard and determined, *Rex* v. *Bermondsey Borough Council* (3), where similarly there was a power of distraint and, relying on that power as an effectual or alternative remedy, the Court refused a mandamus, and the only distinction between the *Poplar Borough Council* case (2) and *Rex* v. *Bermondsey Borough Council* (3) was this, that looking at all the circumstances of the case, in the Court below, Sankey J. (as he then was)

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(1) 1 Q. B. 288, 291. (2) [1922] 1 K. B. 72. (3) (1908) 72 J. P. 330.

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and the Court of Appeal came to the conclusion that in the circumstances of the *Poplar Borough Council* case (1) there was no effectual remedy by distraint; whereas on a similar statute with similar alternative remedies an opposite conclusion had been reached in the *Bermondsey Borough Council* case. (2) As was said by Sankey J. in the *Poplar Borough Council* case (3): "We are far from saying that we should always issue a mandamus in preference to allowing the parties to pursue such an alternative remedy, but we are of opinion that there must be strong reasons which were present in the *Bermondsey* case (2), and are absent in that now under discussion, to induce the Court to refuse mandamus." It is evident from a perusal of that case that the Court can consider the whole of the circumstances and that it is not limited to the question of alternative remedies. Of course in every case where the question of alternative remedies is considered it must be assumed that there is an alternative remedy of some kind or the question would not arise at all, and I am of opinion here that the power to appeal, when the ground of appeal had already been decided at that time against the appellants, is not an appropriate alternative remedy. It follows, therefore, that there is a duty to be performed and an absence of alternative remedy. If that be so, the case would appear to be singularly suited to the remedy of a mandamus. I do not repeat the passages to which my Lord has referred in *Reg.* v. *Mayor, &c., of Rochester.* (4) I merely content myself with citing one passage from the decision of Lord Ellenborough in *Rex* v. *Archbishop of Canterbury* (5) in 1812, where he says: "There have been many dicta of judges cited, from none of which am I prepared to differ, or to deny to any of them their proper weight and authority: the result of them is in effect this, that this Court, in the exercise of its authority to grant the writ of mandamus, will render it as far as it can the supplementary means of substantial justice in every

(1) [1922] 1 K. B. 72.
(2) (1908) 72 J. P. 330.
(3) [1922] 1 K. B. 72, 80.
(4) 7 E. & B. 910; E. B. & E. 1024.
(5) (1812) 15 East, 117, 136.

case where there is no other specific legal remedy for a legal right; and will provide as effectually as it can that others exercise their duty wherever the subject-matter is properly within its control. The right of the Court to apply these means for the attainment of such an end, and to prevent that defect of legal justice which might otherwise ensue, has been in general admitted."

In my judgment in this case it is possible—this is the last matter with which I need to deal—for the borough to carry out its mandate. As I read the judgment in the Court below—apart from finding, as my Lord has said, that they were bound by the decision in *Rex* v. *City of London Assessment Committee* (1), which I need not further discuss, because I associate myself with what has been said by my Lord about that case—the Divisional Court appear to have been of opinion that there was no power in the Corporation to carry out what would have been required of them. In the judgment of Humphreys J., a judge of great experience in Crown practice, in *Rex* v. *Stepney Borough Council*, these observations occur (2): "The powers of the Court of King's Bench are not unlimited. That Court has general power to direct other persons to do that which by law they ought to do; it has no power to require such a body as the Stepney Borough Council to do something which in fact it has no power to do."

Mr. Scholefield has pointed out to us that where a Court has given a decision contrary to the view of the persons compiling the valuation lists, s. 41 of the Act of 1869 provides that an alteration may take place in the valuation list "in consequence of any decision on any appeal to the assessment sessions or a superior court," and those notices of alterations have to be sent to a certain authority. This does not come within that section. It is not by way of appeal; but none the less that section was contemplating that alterations might have been made by operation of law set on foot by the decision of a Court. Sect. 40 speaks of the same proceedings being had by special case, certiorari or otherwise, and, if the lists can be altered when a determination has been made by appeal or by special case or by certiorari under the Act of 1869, I cannot see why lists cannot similarly be altered by command of this Court by authority of mandamus. Although the section does not in terms deal with the specific alterations, it has dealt with alterations ordered by certiorari or special case and by superior Courts on appeal and, therefore, the consequences we have been threatened with of precepting authorities being in confusion and there being a turmoil in local government does not alarm me so much as it might otherwise have done, seeing that the statute has already provided for alterations and that the alterations were provided for by certiorari or special case, but provision has not been made for the case when alterations are ordered by mandamus. I cannot think that the local government of London would be so much more perturbed by the fact that the alteration was made as the result of a writ of mandamus than it would be if it were made by certiorari or special case. I answer the third question, therefore, by saying that I think there is power by which this command can be carried out, and I agree with my Lord that if it were carried out in the form suggested no question can hereafter arise whether this be the final valuation list or not, because it will be the valuation list in force and, therefore, by operation of s. 5 of the Act of 1869 it will be for all purposes conclusive, and that will be the end of the matter; in other words, John Walker & Sons, as the result of the operation of the writ, will stand in the position in which the Divisional Court in April, 1931, decided that they ought to stand.

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(1) [1907] 2 K. B. 764. (2) (1932) 48 Times L. R. 660, 661.

I only express some surprise myself that the Borough Council did not see fit to have this matter determined by declaration, taking up the position that they were merely trustees for the public, rather than exercise so much vigour in deciding a question of such dubious merit.

ROMER L.J. Had it not been for the decision of this Court in *Rex* v. *City of London Assessment Committee* (1), I do not

(1) [1907] 2 K. B. 764.

think I should have found any difficulty in this case. It is now admitted that at all material times the four hereditaments the subject-matter of these proceedings were occupied and used wholly for industrial purposes. That being so, there was a statutory duty imposed upon the rating authority when they were preparing the valuation list in the early part of the year 1930 to include these hereditaments in Part II. of the list, that duty being imposed upon them by sub-s. 1 of s. 4 of the Rating and Valuation (Apportionment) Act, 1928, and r. 2 of the London Valuation Lists Regulations of 1929. It was said indeed on behalf of the rating authority that, so far from their being at that time under any such statutory duty, they were prohibited by statute from inserting the herditaments in Part II. of the valuation list because of the provisions of s. 70, sub-s. 4, of the Local Government Act, 1929. That sub-section provides as follows: "Notwithstanding anything in the Rating and Valuation (Apportionment) Act, 1928, no hereditament shall, for the purposes of any valuation list which will come into force after the appointed day, be treated as"—I am only reading the material words—"an . . . . industrial . . . . hereditament unless it was so treated for the purposes of the last preceding valuation list." The last preceding valuation list was the one that was in force on October 29, 1929. At first sight there might seem to be some force in that contention, but when the Divisional Court on April 23, 1931, delivered a judgment reversing the decision given by Quarter Sessions on December 10 or 11, 1929, the valuation list in force in October, 1929, was thereupon altered nunc pro tunc; so that the valuation list in force on December 10 must be deemed to have been one in which these hereditaments appeared in Part II. of the list, and, that being so, it must be taken that there was no statutory prohibition precluding the rating authority when they prepared their list at the beginning of 1930 from inserting these hereditaments in Part II. Had the rating authority performed what must be taken to have been its statutory duty in preparing it, there can be no doubt but that the valuation list now in force would have contained these four hereditaments in Part II. and, that being so, prima facie, the duty not having been performed, a writ of mandamus should now issue compelling them to make the proper alteration in the list. It was, however, further urged on the part of the rating authority that the writ should not issue because the Legislature has provided an equally convenient, beneficial and effectual remedy of which the appellants could have availed themselves.

I agree for the reasons that have already been given by the other members of the Court that the appellants could have objected to this list by virtue of the provisions of s. 18 of the Act of 1862 when read with s. 11 and s. 7 of the Act of 1869; they could have objected before the Assessment Committee to the inclusion of these hereditaments in Part I. of the valuation list, and to their exclusion from Part II. If the Assessment Committee had decided that point against them, as of course an Assessment Committee at that time would necessarily have done, they would have had a right of appeal not, I think, under s. 19 of the Act, but under s. 32 of the Act to Quarter Sessions. Had Quarter Sessions decided against them, as at that time Quarter Sessions would necessarily have done, they could then by a special case have proceeded to a Divisional Court. That indeed was open to them, but so far from that being an equally convenient, beneficial and effectual remedy, it appears to me it would have been an extraordinarily inconvenient one.

Now that would be sufficient to dispose of this case were it not for the decision of this Court in *Rex* v. *City of London Assessment Committee* (1), to which I have already referred. The difficulty created in my mind by that case is this. The Court of Appeal decided against the rating authority in that case, who were applying for a writ of mandamus on two grounds: the first ground was that the rating authority had an equally convenient, beneficial and effectual remedy, inasmuch as they had a right of appeal under the Act of 1869;

(1) [1907 2 K. B. 764.

but the second ground on which the Court proceeded was that even assuming the rating authority had not such a right of appeal, nevertheless Parliament had provided rights of appeal for other persons. If one is going to apply the test of what is convenient, beneficial and effectual, it is ridiculous to say that a right of appeal in other people whose interests are in conflict with those of the rating authority provided a rating authority with a convenient, beneficial or appropriate remedy. That the interests of these other persons were adverse to those of the rating authority is sufficiently apparent from the fact that numbers of them appeared by counsel and argued strenuously against the granting of the rule which the rating authority were asking for. Now Vaughan Williams L.J. was of opinion that the Corporation of London as a rating authority had a power of appeal if they had wished to exercise it and then he added (1): "Is there a sufficient and convenient remedy to be found in the Act of Parliament, even on the assumption that no specific right of appeal is given to the Corporation of London as a rating authority?" This question he answered as follows: "even if they had not that power of appeal, the reasonable reading of this statute is that the Legislature thought that the remedies by way of appeal given to those primarily interested were sufficient for the purpose of doing justice, especially where the assessment was only to operate for a limited time." The matter was further developed by Fletcher Moulton L.J., who was delivering a judgment agreeing with that of Vaughan Williams L.J., as follows. He says (2): "The Legislature has drawn up a code of procedure, which was intended to be a practical code, for ensuring the substantial accuracy of a valuation list. The preparation of the list is hedged round by various safeguards, which allow persons directly and primarily interested to be heard during the period of its preparation; and when the Legislature has decided what are proper safeguards sufficient to ensure in practice a proper valuation list, it is not for us to add new safeguards." Those words

(1) [1907] 2 K. B. 787. (2) Ibid. 794.

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used by Fletcher Moulton L.J. and, indeed, the words used by Vaughan Williams L.J., are very wide. They seem to me to amount to this, that no one can impeach or contest the accuracy of a valuation list, when once it has become a valuation list in force, by the prerogative writ of mandamus. For myself I am unable to distinguish that case, and I should have felt myself bound by it to decide against the appellants here, leaving them to go to the House of Lords; but, inasmuch as the other members of the Court have found themselves able to distinguish this case, this appeal will of course be allowed with the results that have been indicated, and I am very glad that they have been so able to distinguish this case, because by making the order which the Court is now making we are able to relieve the appellants from what every one agrees would otherwise have been a very great hardship.

Appeal allowed.

Solicitors for appellants: *Redfern & Co.*

Solicitors for respondents: *E. F. L. Danbury, for the Town Clerk, Stepney.*

W. I. C.

CUTLER *v.* UNITED DAIRIES (LONDON), LIMITED.

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[1930. C. 4300.]

Negligence—Attempt to hold bolting Horse—Owner's Knowledge of Horse's Vice—Plaintiff's own Risk—Remoteness of Damage—Volenti non fit injuria.

A horse belonging to the defendants and attached to one of their vans was seen by the plaintiff running past his house without the driver. It entered a field immediately adjoining, and separated by a hedge from, the plaintiff's garden, and the driver, who had followed it, was trying to pacify it, but as it continued very restive, the driver, who was excited, shouted "Help, help!" whereupon the plaintiff went over the hedge and attempted to hold the horse, but it suddenly reared and threw him to the ground causing him serious injuries, in respect of which he sued the defendants. There was evidence that the horse had bolted once, if not twice, before. The jury found (1.) that the plaintiff did not freely and voluntarily, with full knowledge of the nature of the risk he ran, impliedly agree to incur it; (2.) that the defendants were guilty of negligence in employing the horse to draw the van; and (3.) that that negligence was the cause of the accident:—

Held, that the negligence (if any) of the defendants in employing the horse could not be said to be the cause of the accident, inasmuch as there was a novus actus interveniens—namely, the plaintiff's attempt to hold the horse, which he must have known was attended with risk, and therefore that the principle of "volenti non fit injuria" applied and precluded the plaintiff from recovering.

Per Scrutton L.J.: If a horse bolts in a highway and a bystander tries to stop it and is injured, the owner of the horse is under no legal liability to the injured person.

Per Slesser L.J.: If a man sees his child in great peril in the street from a runaway horse, and, moved by paternal affection, dashes out and is injured in attempting to stop the horse, it may in those circumstances well be said that there is in law no novus actus interveniens.

APPEAL from a decision of Horridge J. in an action tried with a common jury.

The plaintiff claimed damages in respect of injuries sustained by him in the following circumstances: On August 26, 1930, he was residing at Shepperton-on-Thames when he saw a horse attached to a van belonging to the defendants running past his house very quickly and without the driver, the horse having apparently been startled by a noisy pleasure steamer on the river close by. Fearing for the safety of his children, the plaintiff went into the back garden where he found them quite safe, but immediately adjoining the garden, and separated from it by a hedge, was a field in which he saw the horse which the driver was attempting to pacify. It was still, however, very restive, and the driver, who was excited, shouted "Help, help!" whereupon the plaintiff went over the hedge and attempted to hold the horse, but it suddenly reared and threw him to the ground, causing the injuries in respect of which he sued.

The evidence given by the plaintiff is set out in the judgment of Scrutton L.J.; a material part was as follows: "I was frightened, because the man looked in an awful state, and because I had no great knowledge of horses. I attempted to hold the horse. I was frightened because it looked dangerous, but overcame my fear. I had not enough knowledge of horses to know if after running away they are in a very nervous condition."

It appeared that once previously, if not twice, the horse had bolted, and it was alleged that the defendants were guilty of negligence in employing it.

Horridge J. left certain questions to the jury, which with their answers were as follows: (1.) "Did the plaintiff freely and voluntarily, with full knowledge of the nature of the risk he ran, impliedly agree to incur it?" (A.) "No." (2.) "Were the defendants guilty of negligence in employing the horse to draw the van?" (A.) "Yes." (3.) "Was such negligence the cause of the accident?" (A.) "Yes." (4.) "Damages?" (A.) "520*l.*" Judgment was thereupon entered for the plaintiff for that amount.

The defendants appealed.

Joy K.C. and *G. J. Paull* for the appellants. First, there was no evidence which justified the finding of the jury that the appellants were guilty of negligence in employing the particular horse to draw the van. The fact that it had once bolted in circumstances of which we know nothing does not stamp it for ever as a dangerous animal. As Erle C.J. said in *Hammack* v. *White* (1): "A variety of circumstances will

(1) (1862) 11 C. B. (N. S.) 588, 595.

cause a horse to become restive. The mere fact of restiveness is not even prima facie evidence of negligence": see, too, to the same effect, *Shaws* v. *Croall & Sons.* (1)

Secondly, even assuming that the finding of the jury that the appellants were guilty of negligence in employing the horse can be sustained, the damage complained of did not flow from that negligence, and could not possibly have happened but for the fact that the respondent went over the hedge to the help of the driver. Either he did so at the request of the driver, in which case the doctrine of common employment applies and precludes his right to recover, or, being a mere volunteer, the principle volenti non fit injuria is applicable. The doctrine of common employment applies to the case of a person who is injured whilst voluntarily assisting a servant in his work: *Degg* v. *Midland Ry. Co.* (2); *Bass* v. *Hendon U. D. C.* (3); *Heasmer* v. *Pickfords, Ld.* (4) The fact that there might be said to have been an emergency gave no authority to the driver to invite the respondent's assistance: *Houghton* v. *Pilkington.* (5) In any view the respondent brought the accident on himself; he was in complete safety and need not have crossed the hedge.

H. Infield (*Ivan Cruchley* with him) for the respondent. First, the jury were entitled to find that the appellants were guilty of negligence in sending out the horse which to their knowledge had previously bolted, certainly once if not twice. It is that negligence of which complaint is made, not negligence on the part of the driver. Vice in a horse is equal to defect in plant: see *Yarmouth* v. *France.* (6)

Secondly, as regards the argument based on the doctrine of common employment, that point is not open to the appellants on the pleadings. Further, the doctrine does not apply where, as in this case, the negligence was antecedent to the accident and thus to the common employment.

[SCRUTTON L.J. We are at present disposed to take the view that the respondent is precluded from recovering on the principle volenti non fit injuria.]

(1) (1885) 12 R. 1186.
(2) (1857) 1 H. & N. 773.
(3) (1912) 28 Times L. R. 317.
(4) (1920) 36 Times L. R. 818.
(5) [1912] 3 K. B. 308.
(6) (1887) 19 Q. B. D. 647.

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It cannot be said that the respondent appreciated the nature and extent of the risk involved by going to the driver's assistance, and, that being so, the principle embodied in the maxim has no application. [He referred to *Osborne* v. *London and North Western Ry. Co.* (1)]

SCRUTTON L.J. In this case, which has been well argued by counsel on both sides, the appellants, the defendants in the action, complain of the jury's findings and the judgment entered thereon. The judge asked the jury : (1.) " Did the plaintiff freely and voluntarily, with full knowledge of the nature of the risk he ran, impliedly agree to incur it ? " To that the answer was : " No." (2.) " Were the plaintiffs guilty of negligence in employing the horse to draw the van ? " Answer : " Yes." (3.) " Was such negligence the cause of the accident ? " Answer : " Yes." The jury assessed the damages at 520*l.*, for which judgment was given. I have come to the conclusion that there was no evidence on which the jury could answer " No " to the first question or " Yes " to the third question. I agree that if there was evidence it was for the jury and not for me, but if there was no evidence, as in my opinion there was not, it is our duty to do what the judge should have done—namely, withdraw the case from the jury.

The appellants, who supply milk, do so, as is usual, by delivering it from carts drawn by horses in charge of milkmen. On the day in question the respondent, the plaintiff, who had nothing to do with the appellants, was staying at Shepperton, there being a road between his house and the river, and some of his children were playing in the garden at the back of the house. The respondent saw from his house a horse and cart galloping or going past quickly, and without a driver. Being apprehensive about his children, he went through the house and into the garden, where he found his children playing quite safely. By this time the horse was in a field adjoining the garden, and the respondent saw the driver trying to pacify it. It was still very restive, and

(1) (1888) 21 Q. B. D. 220.

the driver, who was excited, shouted "Help, help!" whereupon the respondent went over the hedge into the field and tried to hold the horse's head, but it reared and knocked him down, injuring him.

In his evidence the respondent said: "I saw a horse and milk cart pass rather quickly. I went through to the back to see after my children. The children were in the garden. At this time the horse and cart were at the back, the horse being about three yards from the fence. The horse and cart were standing diagonally, with the horse's head looking slantwise towards the house—that is, in the field off the highway. The driver was standing on the near side of the cart. Horse was facing south-west. The driver was very excited and shouted 'Help, help' . . . . By the time I got over the fence the driver had moved a little towards the fence and seemed very upset, and he asked me to hold the horse's head. . . . . I had a fear for my children, and when he asked me to hold the horse's head I am rather ashamed of feeling a little afraid for myself. I feel ashamed, because I was afraid of getting hurt. I was frightened for my children; then when he asked me I was afraid for myself and I overcame that fear. . . . . I just wandered to the back to be sure my children were there. I had no fear in my mind of danger to them if they were in the back. The children were playing about 40 feet from the house out of about 300 feet. I think I saw the horse and children at the same time. The horse was then stationary; breathing heavily. It struck one that it was a runaway horse. I thought I had left my children quite safely while I went up to the hedge. I was frightened, because the man looked in an awful state, and because I had no great knowledge of horses. I attempted to hold the horse. I was frightened because it looked dangerous, but overcame my fear. I had not enough knowledge of horses to know if after running away they are in a very nervous condition." In re-examination he said: "I know very little about horses. I did not know enough to be either afraid or not afraid." That, of course, is quite contrary to what he said in cross-examination. In his evidence the driver said

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this: "I had been holding the horse for five minutes before Cutler came out. I was trying to pacify the horse which was very restless. Succeeded a little, but not much. When Cutler came out, still restless. You cannot say still liable to bolt. Nothing to indicate to any one coming up that the horse was liable to bolt. I would not have asked him to hold the horse, nor would I have gone to the head myself if I thought the horse was liable to bolt." The horse, it appeared, had been left outside a customer's house, while the driver went to deliver milk; a chain had been put on the wheel to prevent the horse moving away, but apparently it had been startled by a noisy pleasure steamer coming up the river.

I will assume that the jury could find that the appellants were guilty of negligence in employing the particular horse to draw the van, although I entertain considerable doubt whether the jury were properly directed on the point. It appears that once or twice, it is not quite clear which, but I will assume that the jury found that the horse had bolted twice previously—on one occasion when his nosebag had come off, and that startled him. The law on the subject of damage caused by animals has been fully investigated in one or two cases. In *Manton* v. *Brocklebank* (1) the facts were that a mare was put into a field to graze with a horse; the mare kicked the horse, and the owner of the mare was held not liable. In *Buckle* v. *Holmes* (2), A.'s cat killed B.'s pigeon, and B. sued A. The Court of Appeal held that as it was notorious that a cat will kill any small bird, a person who keeps a cat is not liable for the consequences which follow from the ordinary nature of the cat. The action therefore failed. There are two classes of animals. There is the dangerous class, of which a tiger is the regular illustration. If a person keeps a tiger, he is responsible for any damage it may do. Secondly, there is a class of tame animals as to which the owner is not liable for its ordinary habits. It is in the interests of the public that tame animals should be kept; but if an animal has any particular vice, the owner, if he knows of it, will be liable for the damage that it does. The doubt I have is this. I cannot believe that there is a horse in England which has not shied at something in the course of its life. It is, I believe, the ordinary habit of horses, being nervous animals, to shy frequently at outside things, and I doubt whether this aspect of the case was sufficiently explained to the jury. I am startled to hear that if a horse has once shied, the owner, if he knows of it, is responsible for any damage it may do subsequently by shying. I will assume, however, as I have said, that the jury's verdict was correct, that there was negligence in employing to draw the milk van a horse which had twice shied or bolted before. No complaint is made of any negligence on the part of the driver.

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(1) [1923] 2 K. B. 212.

(2) [1926] 2 K. B. 125.

I now come to the more serious point in the case. I start with this: A horse bolts along a highway, and a spectator runs out to stop it and is injured. Is the owner of the horse under any legal liability in those circumstances? On those facts it seems to me that he is not. The damage is the result of the accident. The man who was injured, in running out to stop the horse, must be presumed to know the ordinary consequences of his action, and the ordinary and natural consequence of a man trying to stop a runaway horse is that he may be knocked down and injured. A man is under no duty to run out and stop another person's horse, and, if he chooses to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head and not on that of the owner of the horse. This is sometimes put on the legal maxim volenti non fit injuria; sometimes it is put that a new cause has intervened between the original liability, if any, of the owner of the horse which has run away. That new cause is the action of the injured person, and that new cause intervening prevents liability attaching to the owner of the horse.

To the case I have supposed I now add this: Suppose that a horse runs away, and a man who is standing on the pavement hears a call "Stop him!" from the driver. What effect, if any, does the call have? The moment that the man tries to stop the horse and is knocked down he is in a

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legal difficulty. Has the driver any authority from his master to employ other people to run risks? If he has authority, is not the person who responds affected by the doctrine of common employment? In this case the accident took place not on the highway, but in a field into which the horse had run off the highway, and the respondent acted in response to a request from the driver. In my view, there was no evidence on which the jury could find "No" in answer to the question: "Did the respondent freely and voluntarily, with full knowledge of the nature of the risk he ran, impliedly agree to incur it?" The respondent said he was afraid to go at first because he thought it was dangerous. He saw that the horse had run away, that the driver was excited, and that it was out of breath and apparently exhausted. In those circumstances the ordinary and natural consequence that any man must foresee, if he tries to hold a runaway and restless horse, is that he may be injured by it. If he sustains injury in those circumstances it results from his own intervention. He cannot be heard to say: "I did not know how much he would plunge." I quite agree with Wills J. in *Osborne* v. *London and North Western Ry. Co.* (1), where he said in reference to certain remarks of Lord Esher M.R. in *Yarmouth* v. *France* (2): "Those observations go far to make it hard for a defendant to succeed on such a defence as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that cannot be helped." It can be helped in clear cases where the plaintiff must have known, or must be presumed to have known, the ordinary consequences of his act; in such cases he cannot successfully say: "You are under a liability to me; I did not understand the risk I was taking." Here the respondent was under no duty to go and hold the horse; he was not the appellants' servant; and he is in the difficulty that even if he could show authority in the driver to employ him, he would be in common employment with the driver.

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(1) 21 Q. B. D. 220, 224.

(2) 19 Q. B. D. 647, 657.

With regard to the jury's finding on the third question, it is of course quite true that if the horse had not been put into the cart it would not have run away; if it had not run away the respondent would not have attempted to stop or hold it, and the accident would not have happened. But again to diverge into Latin: post hoc is not propter hoc. There is a passage in the "Rejected Addresses" where the question is asked: "Who fills the butchers' shops with large blue flies?" (1) And the answer is Napoleon, because he had been campaigning on the Continent and the blue flies had come into England. It does not follow that the negligence of a person in employing an improper horse must make him liable for everything that happens afterwards. If, therefore, that which happens is the result of a new cause intervening, as where a person intervenes in a matter in which he has no duty to act, it cannot be said that in law the negligence is the cause of the accident.

Without deciding anything about the doctrine of common employment, I come to the conclusion that there was no evidence on which a reasonable jury could answer the first and third questions in the way they did, and therefore that this appeal must be allowed.

SLESSER L.J. I agree that the appeal must be allowed. In my opinion it was not possible for the jury to answer the question, "Was such negligence the cause of the accident?" in the affirmative. In his direction on this question the learned judge has gone no further than to inquire into the causa sine qua non. The problem which ought to have been considered—namely, whether if the owners of the horse had been negligent (in view of the fact that it had previously bolted), the plaintiff had not by his own act put himself within the zone of the peril which caused the accident —was not sufficiently put to the jury. With the evidence as we have it, it seems plain that the essential cause of the accident—the causa causans—was the act of the respondent himself in acceding to the request to hold the horse's head, that and nothing else. There may be cases, where, for example, a man sees his child in great peril in the street and, moved by paternal affection, dashes out and holds a runaway horse's head in order to save his child, and is injured; there there is no novus actus interveniens. (1) Certainly a man is entitled, in order to save himself, to attempt to arrest a runaway horse. But in the present case the respondent of his own motion gets over a hedge in response to the words "Help, help!" and imperils his life or limbs by trying to hold the horse. However heroic and laudable may have been his act, it cannot properly be said that it was not in the legal sense the cause of the accident. For that reason I come to the conclusion that the jury could not find that the appellants' negligence, which I will assume to have existed, was the cause of the damage. The action therefore fails on the threshold, because of the failure to show that the negligence caused the damage of which complaint is made. The appellants can also properly say that the respondent agreed to accept freely and voluntarily, with full knowledge of the risk he ran, the chances of the injury he suffered. The case is one where the maxim volenti non fit injuria applies.

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(1) [The first line of the couplet is: "Who makes the quartern loaf and Luddites rise?"—F. P.]

An argument was addressed to us on the question of common employment. The plea of common employment is not upon the record, and Horridge J. refused to accept a defence on that head. I do not therefore deal with it, but I desire to say this, that if the point had to be considered —if it were the only defence relied upon—I think there is not sufficient material before this Court to show the exact relation between the appellants, who are a limited company, and the servant, who was not called, who was their horse-keeper, for us to come to the conclusion that negligence was attributable to the appellants through their servant and not through their own negligence. For the defence of common employment to succeed there must be a fellow servant guilty of negligence. That on the evidence is not shown.

(1) [See *Brandon* v. *Osborne Garrett & Co.* [1924] 1 K. B. 548, and the New York case there commented on by Swift J.—F. P.]

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If the defence of common employment had been open and the question had turned on that point, I think there would have had to be a new trial. It does not, however, arise. As the negligence alleged cannot properly be held to have caused the damage, and as the respondent in any event voluntarily and with full knowledge incurred the risk by which it was caused, the appeal must be allowed.

EVE J. I agree, and in order not to fall behind my learned brethren in Latinity, I express my conclusion in this way: that the injuries sustained by the respondent were due to a course which he adopted ex mero motu.

Appeal allowed.

Solicitors for appellants: *Cole & Matthews.*
Solicitor for respondent: *A. R. Lord.*

J. S. H.

1933
May 2, 3.

MILLER *v.* PILL.

PILL *v.* FURSE.

PILL *v.* J. MUTTON AND SON.

Road Traffic—Public Service Vehicle—Stage or Express Carriage—Exception of Vehicle used on "Special Occasion"—Annual Excursion to Seaside—Weekly or Fortnightly Market—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61, *sub-ss.* 1, 2.

By the proviso to s. 61, sub-s. 1, of the Road Traffic Act, 1930, a motor vehicle adapted to carry less than eight passengers shall not be deemed to be a stage carriage or an express carriage (so as to require to be licensed as a public service vehicle) by reason only that on occasions of "race meetings, public gatherings and other like special occasions" it is used to carry passengers at separate fares.

By the proviso to s. 61, sub-s. 2, of the Act, a vehicle used "on a special occasion for the conveyance of a private party" shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares (so as to require to be licensed as a public service vehicle) by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion.

The words "special occasion" in the proviso to sub-s. 2 have the same meaning as that which they bear in the proviso to sub-s. 1. They refer, not merely to the views and intentions of the members of the private party, but to a special local occasion.

Where, therefore, a vehicle was used to take a party of private individuals on an excursion to the seaside on which a similar party went every year:—

Held, that that was not a "special occasion" within the proviso to sub-s. 2.

A regular weekly market or a cattle market held on the second, fourth, and (if any) the fifth Tuesday in every month is not a "special occasion" within the proviso to sub-s. 1.

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CASE stated by justices.

At a court of summary jurisdiction sitting at Launceston an information was preferred by Police-Superintendent William Morley Pill (hereinafter called "the respondent") under the Road Traffic Act, 1930, against E. F. Miller, trading as E. F. Miller & Son (hereinafter called "the appellant"), for that he on August 7, 1932, between Looe and Launceston in the county of Cornwall did unlawfully permit to be used a public service vehicle as an express carriage, he then and there not being the holder of a road service licence authorizing such service, contrary to s. 72 of the Road Traffic Act, 1930.

The following facts were proved or admitted :—

(1.) The appellant was at all material times the owner of a motor omnibus for which he held a licence from the Traffic Commissioners as a stage carriage for eight passengers to run only in the borough of Launceston as a station omnibus. The driver of the omnibus was one John Sandercock. The omnibus was not used as a stage carriage on Sundays as there were no Sunday trains, and the driver normally had the day off.

(2.) On August 5, 1932, one John Herbert Wilfred Rowe, a grocer's assistant, asked Sandercock if he could hire the omnibus to go to Looe with a party on the following Sunday. Sandercock asked the appellant's son and manager, William Ernest Miller, who gave permission for the omnibus to be so used provided that the sum of 1*l.* 12*s.* was paid to the appellant therefor.

(3.) Mr. Rowe collected a party which comprised the following eight persons—Miss Pearce and her mother, Miss Atkins and her aunt (Miss Sargent), Miss Edgcombe, Miss Geake, Mrs. Hill, and himself. Of these, Miss Pearce and Miss Atkins worked in the same shop as Mr. Rowe, and Miss Edgcombe and Miss Geake worked in the adjoining shop, while Mrs. Hill was a friend.

(4.) Mr. Rowe had for each of the last four years arranged a similar party comprising seven of the same people for a trip to Looe in the summer, and on this occasion he saw the people and made all the arrangements, and told the omnibus driver to pick them all up together at Westgate Street corner, Launceston.

(5.) As a result of Mr. Rowe's request, Sandercock booked the omnibus to go to Looe on August 7, after receiving the consent of the appellant, and the omnibus duly went to Looe on that date, the eight passengers being picked up at Westgate Street corner.

(6.) Each of them paid four shillings and sixpence to Sandercock for his or her fare. He paid to the appellant 1*l.* 12*s.* and retained four shillings for driving the omnibus in his time off.

(7.) The appellant authorized Sandercock to take the omnibus with Mr. Rowe's party to Looe on Sunday, August 7, on payment of 1*l.* 12*s.*

For the appellant it was contended that the omnibus was not an "express carriage," as by virtue of s. 61, sub-s. 2, of the Road Traffic Act, 1930 (1), it was provided that a vehicle used on a special occasion for the conveyance of a private party did not require a road service licence; that the omnibus on this occasion was a contract carriage as defined by s. 61, sub-s. 1, of the Act (1); and that the appellant

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(1) By the Road Traffic Act, 1930, s. 61:

"(1.) Public service vehicles shall, for the purposes of this Part of this Act and the regulations made thereunder, be divided into the following classes:—

(*a*) Stage carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (any or all of which are less than one shilling for a single journey or such greater sum as may be prescribed), stage by stage, and stopping to pick up or set down passengers along the line of route, and any other motor vehicles carrying passengers for hire or reward at separate fares and not being express carriages as hereinafter defined:

(*b*) Express carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (none of which is less than one shilling for a single journey or such greater sum as may be prescribed) and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying the appropriate fares for the journey or journeys in question:

(*c*) Contract carriages; that is to say, motor vehicles carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum:

Provided that a motor vehicle adapted to carry less than eight passengers shall not be deemed to be a stage carriage or an express carriage by reason only that on occasions of race meetings, public gatherings and other like special occasions it is used to carry passengers at separate fares.

(2.) It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not:

Provided that a vehicle used on a

had only authorized its use on this occasion as a contract carriage and for use on a special occasion for conveyance of a private party.

On the part of the respondent it was contended that the appellant was guilty of the offence; that the case came outside the exemption in s. 61, sub-s. 2, of the Road Traffic Act, 1930; and that there was nothing special about the occasion, and nothing private about the party.

The justices' attention was directed to the following decisions: *Birmingham and Midland Motor Omnibus Co., Ld.* v. *Nelson* (1); *Osborne* v. *Richards.* (2)

The justices, by a majority, being of opinion that, in so far as it was a question of fact for their decision, the passengers (by reason of the fact that separate fares were charged) did not comprise a private party, and that the occasion was not a special occasion, held that the offence charged had been committed, and they fined the appellant one pound with one guinea advocate's fee. They agreed, however, to state a case.

The question on which the opinion of the Court was desired was whether on the above statement of facts the justices came to a correct determination and decision in point of law.

Horridge for the appellant. There was no evidence to support the justices' finding that this was not a private party. The justices were also wrong in holding that there was no special occasion, for "special occasion" means no more than a use of the vehicle in a way outside its ordinary and regular use. It is sufficient that the use should be isolated or occasional. Whether it is so may be a question of fact, but here the evidence was all one way, that this was the annual summer outing of this party of friends. This is the view taken by the Scottish Court of Justiciary in *M'Dougall* v. *Paterson.* (3)

special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

(1) [1933] 1 K. B. 188.

(2) [1933] 1 K. B. 283.

(3) (1933) Sc. L. T. 372.

Sir Boyd Merriman S.-G. and *Wilfrid Lewis* for the respondent. Two things are requisite if the case is to fall within the proviso to sub-s. 2. First, there must be a private party; then there must be a special occasion. Whether or not the justices' finding that this was not a private party can be supported, the important question in the case is whether "special occasion" means, as the appellant contends, an occasion special to the private party, such as a day at the seaside, or whether, as the police contend, it has a more restricted meaning confined to an occasion special to the whole locality or to the public. In sub-s. 1 reference is made to "race meetings, public gatherings and other like special occasions," and it is submitted that "special occasion" should be given a similar meaning in sub-s. 2. The annual visit to Looe may have been regarded as a special occasion by Mr. Rowe and his companions, but their arrival was in no sense a special occasion at Looe in the sense of an event attracting, or likely to attract, a large number of the public requiring additional facilities for transport. The Scottish decision of *M'Dougall* v. *Paterson* (1), though entitled to respect, is not binding and should not be followed.

Horridge in reply. It is at least equally probable that the omission of the words referring to race meetings and public gatherings from sub-s. 2 was intentional, and that a less restricted meaning was deliberately given to "special occasion" in that sub-section, on the ground that a private party hiring a vehicle would not materially increase congestion on the roads.

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PILL *v.* J. MUTTON AND SON.

Cases stated by justices.

At a court of summary jurisdiction sitting at Launceston, an information was preferred by the appellant, William Morley Pill, against the respondent, Percival James Furse, for that he, on August 27, 1932, did unlawfully use a motor vehicle as an express carriage at Broad Street, Launceston, he not being the holder of either a public service vehicle licence or a road service licence authorizing such use, contrary to ss. 67 and 72 of the Road Traffic Act.

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(1) (1933) Sc. L. T. 372.

On the hearing of the information it was proved or admitted that the respondent was at all material times the owner of a motor vehicle which, on August 27, 1932, at Broad Street, Launceston, he permitted to be used for the purpose of carrying four passengers for reward at separate fares from Yeolmbridge to Launceston and back. The respondent was not the holder of either a public service vehicle licence or of a road service licence authorizing such use, as required by ss. 67 and 72 of the Road Traffic Act, 1930. August 27, 1932, was a Saturday, on which day a regular weekly market was held at Launceston.

On the part of the respondent it was contended (inter alia) that the vehicle in question was used on a "special occasion" within the proviso to s. 61, sub-s. 1, of the Road Traffic Act, 1930, and should not, therefore, be deemed to be an "express carriage."

The justices were of opinion that the market was a "public gathering or other like special occasion" within the proviso, and they dismissed the information.

At the same court an information was preferred by the appellant Pill against the respondents, J. Mutton & Son, for that they, on August 30, 1932, did unlawfully permit a motor vehicle to be used as an express carriage at Broad Street, Launceston, they not being the holders of either a public service vehicle licence or a road service licence authorizing such use, contrary to ss. 67 and 72 of the Road Traffic Act, 1930.

On the hearing of the information it was proved or admitted that the respondents were at all material times the owners of a motor vehicle which, on August 30, 1932, at Broad Street, Launceston, they permitted to be used for the purpose of carrying six passengers for reward at separate fares from Five Lanes Altarnum to Launceston and back. The respondents were not the holders of either a public service vehicle licence or of a road service licence authorizing such use, as required by ss. 67 and 72 of the Road Traffic Act, 1930. August 30, 1932, was a Tuesday, on which day a regular cattle market was held at Launceston. The market was held on the second, fourth, and (if any) fifth Tuesday in every month.

The justices were of opinion that the submission of the respondents that the market was a "public gathering or other like special occasion" within the proviso to s. 61, sub-s. 1, of the Road Traffic Act, 1930, was correct, and they dismissed the information.

The appellant appealed in both cases.

Sir Boyd Merriman S.-G. and *Wilfrid Lewis* for the appellant. What is a "special occasion" must depend on the view taken of it in the particular locality: *Devine* v. *Keeling.* (1) A regular weekly market day has been held not to be a "special occasion" within s. 57 of the Licensing (Consolidation) Act, 1910: *Rex* v. *Inglis. Ex parte Cole-Hamilton* (2); *Rex* v. *Butt. Ex parte Brooke.* (3) It is impossible to say that an occasion which occurs regularly at stated intervals and is one of the ordinary incidents of country life is a "special occasion." Still less is it a "special occasion" when that phrase must be read ejusdem generis with "race meetings" and "public gatherings." In the present cases the Court is dealing with weekly and fortnightly markets, but in some places there are daily markets, and in those areas there would be an end to traffic control under these sections if the justices were right.

The respondents did not appear in either case.

LORD HEWART C.J. This is a group of cases by no means free from difficulty which arise under Part IV. of the Road Traffic Act, 1930, the subject-matter of that Part being the regulation of public service vehicles. Sect. 61 of the Act provides for the division of those vehicles into certain classes, and s. 67 renders it necessary for a public service vehicle to be licensed and for its user accordingly.

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(1) (1886) 50 J. P. 551.
(2) (1921) 37 Times L. R. 359.
(3) (1922) 38 Times L. R. 537.

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It has been urged by the Solicitor-General in this case that, in considering the meaning of the words "special occasion" in the proviso to s. 61, sub-s. 2, of the Act, it is reasonable to look at the way in which the same expression is used in the proviso to s. 61, sub-s. 1. There the phrase is "on occasions of race meetings, public gatherings and other like special occasions." In my opinion, although the matter is by no means free from doubt, there is great force in that argument. I think that it would be wrong and misleading if the term "special occasion" were used in two different senses in the space of a few lines in the same section of the same Act of Parliament. The justices found as a fact that the occasion was not a special occasion and, although there may be much to be said to the opposite effect, I have come to the conclusion that the argument for the appellant is unsuccessful and that this appeal must be dismissed. It is true that the justices also found that the passengers in the vehicle did not comprise a "private party" and that they found that for a reason that was clearly wrong—namely, because separate fares were charged, but that, I think, is immaterial.

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In these two cases the question is very much simpler. In the first case a regular weekly market was held to be a "special occasion" within the proviso to s. 61, sub-s. 1, and in the second a regularly held cattle market was also so held. In my opinion the Solicitor-General is again right when he contends that an occasion which regularly and frequently recurs cannot be a "special occasion" within the proviso. That argument derives strength from *Rex* v. *Inglis* (1) and

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(1) 37 Times L. R. 359.

Rex v. *Butt.* (1) I think that these appeals ought to be allowed, and that the cases should be remitted to the justices to find the charges proved and to adjudicate thereon.

AVORY J. In the first case of

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I have, with some difficulty, come to the same conclusion as that expressed by my Lord. I have no doubt that the justices were wrong in holding that the passengers in the vehicle did not comprise a "private party" within the meaning of the proviso to s. 61, sub-s. 2. Quite apart from the fact that they came to that decision on an erroneous ground, there was no evidence on which they could come to any conclusion other than that it was a "private party" within the meaning of the proviso. In view particularly of the judgment of Lord Coleridge C.J. in *Devine* v. *Keeling* (2) the question whether the occasion was a "special occasion" within the meaning of the proviso appears to be so largely a question of fact that I am not prepared to differ from the finding of the justices that this annual visit to Looe was not a "special occasion." I entertain considerable doubt whether the expression "special occasion" in the proviso to sub-s. 2 is to be read in precisely the same sense as in the proviso to sub-s. 1. Certainly it is entirely contrary to the usual practice that the same words should be used in two different senses in the same section of an Act of Parliament, but so many unusual things are found in Acts of Parliament that I am not satisfied that that is a conclusive answer. My inclination at one time was to think that the words "special occasion" in sub-s. 2 might have a different and more extended meaning than when they are used in sub-s. 1, and that the occasion under consideration should be regarded quoad the purpose of the private party to ascertain whether it was a "special occasion" within the proviso to the sub-section. I am not, however, prepared to differ from the view that prima facie the words ought to be read in the same sense in the two sub-sections.

(1) 38 Times L. R. 537.

(2) 50 J. P. 551.

I am satisfied to decide this case on the ground that there is no sufficient reason for differing from the finding of fact by the justices that the occasion was not a "special occasion." I have some doubt whether this decision can be reconciled with the Scottish decision in *M'Dougall* v. *Paterson* (1), but it is to be observed that the question what constitutes a "special occasion" in the proviso to sub-s. 2 was not argued in that case and that there was no discussion with regard to whether there was any difference between the meaning of the words when used in sub-s. 2 and their meaning when they appear in sub-s. 1.

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With regard to these two cases I entirely agree that the findings that the respective markets were "special occasions" cannot be reconciled with the authorities that have been cited and that the appeals should be allowed.

HUMPHREYS J. In the two cases of

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I desire to say nothing except that I agree entirely with the result arrived at by the other members of the Court, and with their reasons therefor.

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In this case I think that the point as to the meaning to be given to the words "special occasion" in the proviso to sub-s. 2 is one of very great difficulty. As Talbot J. observed in his judgment in *Birmingham and Midland Motor Omnibus Co., Ld.* v. *Nelson* (2): "it is obvious that there may be questions very difficult to decide in particular cases whether a vehicle is used on a special occasion for the conveyance of a private party." So far as we are concerned with the question whether the party was a "private party," the only conclusion that I can arrive at is that the justices, for some reason or other,

(1) (1933) Sc. L. T. 372.

(2) [1933] 1 K. B. 188, 197.

intended to decide that the party was not a "private party." For that they give a reason that is so wrong that I doubt whether it could be the reason which actuated them. The conclusion, however, at which I have arrived regarding the meaning of the words "special occasion" render it unnecessary for me to decide whether or not this party was a "private party," although, on the bare facts stated, I agree that it appears to have all the necessary elements of a "private party." On the point whether the occasion was a "special occasion" within the proviso to s. 61, sub-s. 2, if I were dealing with that proviso alone, I should come to the conclusion that the expression "special occasion" refers to something more than the views and intentions of the members of the party and points to something which can be described as a special occasion in the locality and was the object of the journey being undertaken. And when I turn to the proviso to sub-s. 1 of the same section and find there the same expression as part of the phrase "on occasions of race meetings, public gatherings and other like special occasions," it appears to me to be a strong indication that the view which I have expressed is right, because I think that the words in sub-s. 2 should be accorded the same meaning as those in sub-s. 1, from which they are separated by only a few lines of print. Accordingly, I agree that a "special occasion" within the meaning of sub-s. 2 must be a special occasion occurring at the place which is the object of the excursion, or, in other words, something of the same nature as the kind of occasion referred to in the proviso to sub-s. 1, and that it is not enough that it should merely be a special occasion from the point of view of the persons forming the private party. I agree that the matter is by no means free from difficulty, but in the result I agree with the other members of the Court.

Orders accordingly.

Solicitors for appellant Miller: *Hedley Norris & Co., for Peter, Peter & Sons, Launceston.*

Solicitor for Pill: *The Treasury Solicitor.*

G. F. L. B.
J. W. H.

LIDDIARD *v.* WALDRON.

1933
April 7;
May 18.

Easement—Right of Way—No Express Grant—Adjoining Houses—Common Owner—Implied Reservation—Vendor and Purchaser.

A grantor cannot ordinarily reserve an easement for the benefit of land which he retains, otherwise than by express words.

But if, when a common owner first lets or sells one of two houses or building plots, the land includes a strip the situation and nature of which show an intention that it should be available as a way for the convenience of the other house or plot, no subsequent owner or occupier, so long as the circumstances are substantially the same, can claim the right to hold his land free from the right of the occupier of the other house to use the way, and so to frustrate the intention with which the original owner laid out the land.

Thomas v. *Owen* (1887) 20 Q. B. D. 225 followed.

Observations of Shearman and Finlay JJ. sitting as a Divisional Court in *Aldridge* v. *Wright* [1929] 1 K. B. 381, at pp. 384–387 as to inconsistency between *Thomas* v. *Owen* (supra) and *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31 not approved.

APPEAL from Swindon County Court.

The plaintiff and the defendant were the owners and occupiers of two adjoining houses numbered 22 and 21 respectively, New Road, Chisledon, in the County of Wilts, which formed part of a row of houses built at the same time and in the same manner. Behind these houses and between each house and the garden belonging to it there ran a continuously paved path which belonged to the defendant as part of his premises at No. 21. Apart from this path, the plaintiff had no access between his garden and the road, and no means of getting coal from the road to his coal-shed except through the house.

The plaintiff claimed a right of way over this path, alleging (*a*) prescription; (*b*) a way of necessity; and (*c*) the grant of an easement by implied reservation.

The action was heard in the county court on November 5, 1932, and on November 29, 1932, judgment was given by the county court judge in favour of the defendant.

The plaintiff appealed. The facts are fully set out in the judgment of the Divisional Court (Talbot and Macnaghten JJ.) below.

The argument addressed to that Court on behalf of the plaintiff related to paras. (*b*) and (*c*) of the claim only, the claim on the ground of a prescriptive right being abandoned.

Edward Terrell for the plaintiff. The grounds of appeal here are (1.) that there was an implied reservation by the original owner, when he let or sold each house, of a right to the adjoining householders to use the path, and (2.) that this is a way of necessity. As regards the reservation of grant, when the original owner sold No. 21 to the defendant in 1919 there was an existing right of way over the path. She could not take away this right, without derogating from her previous grant of No. 22. The paved way and fence constituted notice of this to the purchaser of No. 21. There is also evidence of user prior to the conveyance to the defendant. This implied reservation of easements was considered in *Pwllbach Colliery Co.* v. *Woodman.* (1) There Lord Parker said that "the law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used." This case is governed by *Thomas* v. *Owen* (2) as regards the reservation of grant, even if the way is not one of necessity. *Thomas* v. *Owen* (2) was applied by Astbury J. in *Westwood* v. *Heywood.* (3) It was not followed in *Aldridge* v. *Wright* (4), but in that case the right claimed was not over a formed way as here, but over a trodden path across a garden. There is no real inconsistency between *Thomas* v. *Owen* (2) and *Wheeldon* v. *Burrows.* (5) It is true that ordinarily a reservation of grant must be in express words as laid down in *Wheeldon* v. *Burrows* (5), but the exception in *Thomas* v. *Owen* (2) is quite clear and is recognized by the Court of Appeal in *Aldridge* v.

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(1) [1915] A. C. 634, 646, 647.

(2) 20 Q. B. D. 225.

(3) [1921] 2 Ch. 130.

(4) [1929] 1 K. B. 381 and (C. A.) 2 K. B. 117.

(5) 12 Ch. D. 31.

Wright (1), especially by Greer L.J. in his list of exceptions to the main rule. Here the circumstances of both demise and conveyance all point to a reservation of grant by the owner in favour of the plaintiff with which the defendant cannot interfere.

E. H. Wethered for the defendant. Express words are necessary, as a general rule, for the reservation of an easement: *Wheeldon* v. *Burrows.* (2) The exceptions are enumerated by Greer L.J. in *Aldridge* v. *Wright* (1), where (para. 3) *Thomas* v. *Owen* (3) is referred to. The flaw in the plaintiff's case is that the reservation of grant in *Thomas* v. *Owen* (3) was only implied in the case of a lease and not as against a freeholder. Here the defendant bought the reversion to the freehold of No. 21 in 1921, and when the term of years came to an end his interest was complete and the easement over his paved path was at an end. The conveyance of No. 22 to the plaintiff was executed six months after the conveyance to the defendant, and there was then no right in the owner to convey an easement over the defendant's premises. In *Thomas* v. *Owen* (3) it was held that there was an implied reservation of the plaintiff's right of way out of the defendant's lease, which operated in favour of the plaintiff. It was not held that this affected the freehold. The easement existed only so long as the tenancy existed. As regards the exceptions other than *Thomas* v. *Owen* (3) which appear in the judgment of Greer L.J. in *Aldridge* v. *Wright* (1), they only apply when the conveyances of the two houses by the common owner are simultaneous: *Swansborough* v. *Coventry.* (4) The plaintiff could acquire no easement over No. 21 upon his purchase of No. 22 unless it was reserved under the conveyance of No. 21 to the defendant in 1919. I rely on the decision in *Aldridge* v. *Wright.* (1) The present case does not fall within any of the exceptions enumerated by Greer L.J. in that case, and *Thomas* v. *Owen* (3) is distinguishable. The right to use the path was originally granted to the occupier of No. 22

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(1) [1929] 2 K. B. 117.

(2) 12 Ch. D. 31.

(3) 20 Q. B. D. 225.

(4) (1832) 2 L. J. (N. S.) (C. P.) 11.

not as an enforceable right, but as a personal licence only. There is no evidence of user as of right to support the plaintiff's claim.

Terrell in reply. The reservation of an easement by implication as laid down in *Thomas* v. *Owen* (1) is not confined to the case of a lessee for a term: *Westwood* v. *Heywood*. (2) The defendant had constructive notice of a permanent way existing for the benefit of both houses, and the reservation of an easement by the original owner in favour of the owner and occupier of No. 22 should here be implied.

Cur. adv. vult.

May 18. TALBOT J. read the judgment of the Court (TALBOT and MACNAGHTEN JJ.), which was as follows: The plaintiff, who is the appellant, is the owner and occupier of No. 22 New Road, Chisledon, Wiltshire, and the defendant, who is the respondent, is the owner and occupier of the adjoining house, No. 21 New Road. The question in the case is as to the right of the plaintiff as owner and occupier of No. 22 New Road to use, for the purpose of access to his garden and coal-shed and to the back of his house, a paved way which belongs to the defendant as part of 21 New Road. The situation of the two houses and of other houses, numbered 23 and upwards in the same row, built at the same time and in the same manner by another owner, is shown on a plan which is in evidence. The way in question is continuous, and continuously paved, behind 21 and 22, and runs between each house and the garden belonging to it. Between 22 and 23 Miss Alford, who built and owned 21 and 22, erected, when the houses were built, a fence preventing passage along the paved way to the east. The learned county court judge did not allude, in his judgment, to the continuous paving of the way in question, a fact which is of great importance in the case; but "the path" which he mentions is no doubt that, the construction of which was described by Miss Alford in her evidence. The way from

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(1) 20 Q.B.D. 225.

(2) [1921] 2 Ch. 130.

22 past 21 is an important convenience to 22. If it cannot be used, the occupier of 22 has no means of getting between his garden and the road, or of getting coal from the road to his coal-shed, except through his house. In 1908 Miss Alford built 21 and 22, and she let them to different tenants. It was said by counsel for the defendant, and not contradicted, that the first tenancy created of 21 was prior in date to the first tenancy created of 22; but the interval was apparently quite short. We regard this, for reasons which will appear later, as without importance. During the first tenancies, the tenant of 22 used the path behind 21, without objection, for all ordinary purposes of a way. In August, 1919, Miss Alford agreed to sell 21 to the defendant, and on October 31, 1919, the conveyance was executed. There is no mention in the deed of a right in the owner or occupier of 22 to the use of the disputed path, though there is an express grant to the purchaser of the right to use, and of a right of way to, a well "on property belonging to one Howard as heretofore enjoyed"; and of a right of drainage into, and user of, the cesspit with the house and premises adjoining (that is, No. 22); and an express reservation of the rights of owners and occupiers of adjoining houses entitled thereto to go along the path to and from the said well. Before the contract of August, 1919, the defendant and his wife inspected the house No. 21, but they swore (and the learned judge believed them) that, though they looked at the garden, they did not inspect the back of the house outside, and were not in fact aware of the existence of the disputed way.

The original tenant of 22 swore (and apparently was not contradicted) that, both before and after the defendant purchased, he used the way frequently and without objection. This was confirmed by Miss Alford, by the plaintiff (who had known the property throughout), by one of the former owners of 22, and by two successive tenants of 21. There appears to be no dispute that in fact the way was used by the occupiers of 22 without objection down to October, 1930. The learned judge, conjecturally, explains this as to be referred to a permission given by the defendant, as mentioned presently, in 1921. There is no evidence of any actual assertion of a right of user before 1930: if the uncontradicted evidence of the plaintiff's witnesses is accepted, there was no occasion for it.

It is pretty plain from the evidence that this unfortunate dispute would not have arisen but for the fact that the children of one of the plaintiff's predecessors in title annoyed the defendant by playing in the path: this, we conceive, could not be justified on any view of the case. The question now, however, is one of legal right, and the origin of the dispute is immaterial or, at any rate, not decisive; and the same applies to the fact found by the judge that the owner of 22 in 1921 apparently thought that he must ask leave to use the way, and did ask leave, though, of course, this may be material as explaining subsequent user.

In March, 1920, one Fox bought 22 from Miss Alford. The conveyance was in terms similar to the defendant's conveyance of 21, and contained no grant of any easement, but it would no doubt include all easements, rights, and advantages covered by s. 62 of the Law of Property Act, 1925. The plaintiff, who bought 22 in 1931, is the successor in title of Fox. In 1921, Fox, at an interview, asked the defendant for leave to take coal, wood, and other things, over the path, and the defendant agreed. The path was used after this, without objection, by Fox, and by two subsequent owners before the plaintiff's purchase, till October, 1930, when the defendant objected, claiming that the path behind his house was his absolute property, and that the occupier of 22 had no right to use it. After negotiations which came to nothing, the plaintiff commenced this action, claiming the right to use the way on the ground (as argued before us) of implied reservation.

On these facts, the question is: Did the defendant, when he bought 21 in 1919, acquire the formed way, which was part of the land bought, absolutely, or did he acquire it subject to a right in the occupier of 22 to use it as a way connecting his house and garden with the high road? In other words, there being no express reservation, was there an implied reservation of that right? There is no doubt that, generally speaking, no easement or right in the nature of an easement, can be reserved by a grantor of land for the benefit of land which he retains, except by express words: *Wheeldon* v. *Burrows.* (1) But it is equally well settled that there are exceptions to this rule. The principle of one important class of these exceptions is stated by Lord Parker in *Pwllbach Colliery Co.* v. *Woodman.* (2) He says: "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. See *Jones* v. *Pritchard* (3) and *Lyttelton Times Co.* v. *Warners, Ld.* (4) But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use." This has often been applied to rights of way, particularly where there is an artificial formed way; and the reservation of a right of way over land conveyed to a purchaser for the benefit of land retained by the grantor, may be implied merely from the existence and situation of the road itself at the date of the conveyance, when the purpose of it is apparent to any one who looks at it: see *Cory* v. *Davies.* (5) In *Hansford* v. *Jago* (6) it was applied to a strip of land not actually formed as a road, where the physical condition of the ground showed that it was frequently used as a way. If we may state the principle, so far as it applies to this case, in a sentence, it is that if, when a common owner first lets or sells one of two houses, or plots on which houses are to be built, the land so let or sold includes a strip, the situation and nature of which show an intention that it should be available as a way for the convenience of the other house or plot, no subsequent owner or occupier can claim to hold his land free from the right of the occupier of the other house to use the way, so long as the circumstances remain substantially the same, and so to frustrate the intention with which the original owner laid out the land: compare the judgment of the Judicial Committee, delivered by Lord Loreburn in *Lyttelton Times Co.* v. *Warners, Ld.* (1), and applied by Lord Parker in the case quoted above. We are here dealing with two houses only, and it is unnecessary to discuss the corresponding mutual rights of owners and occupiers of a series of houses.

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(1) 12 Ch. D. 31.

(2) [1915] A. C. 634, 646, 647.

(3) [1908] 1 Ch. 630.

(4) [1907] A. C. 476.

(5) [1923] 2 Ch. 95, 112, 113.

(6) [1921] 1 Ch. 322.

Thomas v. *Owen* (2) is an important, and indeed in our opinion a governing authority for the decision of this case. The parties there had been for several years before 1873 tenants from year to year of adjoining farms under the same landlord. There was an old lane from the plaintiff's farm over part of the defendant's, connecting, and evidently designed to connect, the plaintiff's farm with a highway. It was not the only connection with the highway, but it was the most convenient and was used as such by the plaintiff. Nothing was known of the origin of the lane but what its character and situation showed. In 1873 the landlord granted to the defendant a lease of his farm, including the lane, but mentioning neither the lane nor any right of the plaintiff over it. In 1878 the landlord granted to the plaintiff a lease of his farm, which was equally silent as to any right to use the lane. In view of the argument for the defendant in the present case it is important to notice that the defendant's lease in *Thomas* v. *Owen* (2) preceded the plaintiff's by several years. Compare *Richards* v. *Rose*. (3) It is to be noticed also that there was no question of reciprocal rights: the right which was claimed as impliedly reserved was solely for the benefit of the plaintiff. It was held that in the lease to the defendant there was implied a reservation in favour of the occupiers for the time being of the plaintiff's farm of the right to use the lane which the plaintiff was in fact using as yearly tenant at the date of the lease. The considered judgment of the Court of Appeal (Lord Esher M.R., Bowen and Fry L.JJ.) contains the following passage: "With regard to the lease of 1873, it is not necessary to consider how the matter would have stood if the lessor had himself been in possession of the plaintiff's farm at the date of this lease to the defendant, for this was not the case. On the contrary, at the date in question the material facts stood thus: the farm, now the plaintiff's, was then in his occupation as tenant from year to year under Sir Richard Bulkeley; the lane in question was a made and fenced road, subsisting visibly for the convenience of the plaintiff's farm and of no use as a road to the defendant; it was and had been openly used by the plaintiff and his predecessors in title for many years and had been repaired by them; the right of using this road constituted an easement of the farm occupied by the plaintiff, and no demise could be made of the soil of the lane free from that right without derogating from the grant to the plaintiff under which his then subsisting tenancy was constituted. In this state of circumstances the presumption that the demise in question of Lon Car Glas was one free from any right of way is, in our opinion, rebutted by a consideration of these circumstances, just as in *Doe* d. *Freeland* v. *Burt* (1) the presumption that the demise of a house extended to the centre of the earth was rebutted by the existence at the time of the demise of the house of an earlier demise of a cellar by the same lessor and the occupation of that cellar by a person claiming under that demise. But then it is urged that alike in implied reservations and in implied grants a rule exists to this effect, that whilst such an implication may arise in the case of easements of

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(1) [1907] A. C. 476, 481.
(2) 20 Q. B. D. 225, 230, 231.
(3) (1853) 9 Ex. 218.

(1) (1787) 1 T. R. 701.

necessity and continuous easements, it cannot arise in the case of easements which are neither of necessity nor continuous, and for this proposition *Polden* v. *Bastard* (1) is cited, and many other authorities might have been invoked. But on this principle, as established by such decisions, there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement (per Bramwell B. in *Langley* v. *Hammond* (2); *Watts* v. *Kelson* (3)); and if the exception arises in the case of a grant we think it ought to arise in the case of a reservation made to support an earlier grant, as in the present case. For these reasons we are of opinion that the lease of 1873 was according to its true construction subject to the right of way over Lon Car Glas then existing in the plaintiff, and that consequently no question of estoppel can arise." The principle of this case appears to us to apply exactly to the present. Miss Alford could not convey to the defendant free of the right of way of the then occupier of 22 without derogating from his tenancy; and if the land was never granted free of the right it is not free now. No more in this case than in *Thomas* v. *Owen* (4) was the right limited to the duration of the tenancy in existence at the time of the grant to the defendant; and the fact that in *Thomas* v. *Owen* (4) the plaintiff himself had been in occupation at the time as yearly tenant is, in our opinion, immaterial. At the time of the action that tenancy had been merged in the plaintiff's lease, and the lease included the right, not because the plaintiff had had it as yearly tenant, but because, as the Court held, it passed by the lease as an appurtenance. Nor do we think that it makes any difference that in the present case it would obviously be untrue to say that the road as a whole is "of no use to the defendant." The case has been followed and applied in *Nicholls* v. *Nicholls* (5); *Hansford* v. *Jago* (6); *Westwood* v. *Heywood* (7); and other cases. We notice that in *Aldridge* v. *Wright* (1) the judges appear to consider that there is some inconsistency between *Thomas* v. *Owen* (2) and *Wheeldon* v. *Burrows*. (3) We do not follow this. There is no doubt of the principle of *Wheeldon* v. *Burrows* (3) nor of the fact that there are exceptions to the application of it. The actual facts in *Wheeldon* v. *Burrows* (3), which was a case of light, are very far removed from the question with which we have to deal. All that *Thomas* v. *Owen* (2) does is to apply the principle of exceptions already recognized to facts differing somewhat from those of cases previously reported. It is clear from the reports of *Aldridge* v. *Wright* (1) in this Court and in the Court of Appeal (1) that that decision does not touch the case of a formed road with which we are dealing here (see especially the judgment of Sankey L.J., as he then was, in the Court of Appeal); and it would be clearly our duty to follow *Thomas* v. *Owen* (2) even if we felt inclined to doubt its correctness: if we may say so, it appears to us to be perfectly correct. The principle upon which it was decided is that a man cannot take land of which the character, state, and use at the time of the grant show irresistibly that the intention of the grantor was that it should be subject to a right of user by a neighbouring occupier, and then claim to hold it free of that right because it is not expressly mentioned: see per Wilde B., *Hall* v. *Lund* (4), and per Martin B. in the same case. (4) This case is cited with approval by Lord Parker in the *Pwllbach Colliery Co.* v. *Woodman* (5), though he there expresses doubt as to another passage in the judgment of Wilde B. We assume, without deciding, that the evidence given by Miss Alford as to what were in fact her intentions as to this right of way was rightly held in the county court to be inadmissible.

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(1) (1865) L. R. 1 Q. B. 156.

(2) (1868) L. R. 3 Ex. 161.

(3) (1871) L. R. 6 Ch. 166.

(4) 20 Q. B. D. 225.

(5) (1899) 81 L. T. 811.

(6) [1921] 1 Ch. 322.

(7) [1921] 2 Ch. 130.

There may possibly be a difference in the case of a reservation by a grantor for his own personal use (see *Thomas* v. *Owen* (6); *Cory* v. *Davies* (7)); but we are dealing

(1) [1929] 1 K. B. 381, 384–387; (C. A.) [1929] 2 K. B. 117.

(2) 20 Q. B. D. 225.

(3) 12 Ch. D. 31.

(4) (1863) 1 H. & C. 676, 681, 686.

(5) [1915] A. C. 634, 647.

(6) 20 Q. B. D. 225, 230.

(7) [1923] 2 Ch. 95, 109, 113.

here with a reservation for the benefit of other grantees or lessees, though no doubt that involves advantage to the grantor, if he can sell or let adjoining land for more; and it is, we think, clear from *Thomas* v. *Owen* (1), Lord Parker's judgment in *Pwllbach Colliery Co.* v. *Woodman* (2); *Hansford* v. *Jago* (3), and *Borman* v. *Griffith* (4), that there is, where the facts demand it, no more difficulty in implying a reservation in favour of other grantees or tenants of the grantor than in implying the corresponding grants to them.

The path and its construction being visible to any one who looks at it, it can, in our opinion, make no difference whether the defendant actually saw it or not: see per Lawrence J. (as he then was), *Cory* v. *Davies.* (5) The fact that the conveyance to the defendant in 1919 contains express reservations and grants of easements, although to be considered, is in no way conclusive against the implication of another reservation, if it is sufficiently required by the "character, state and use of the premises at the time of the grant": see *Cory* v. *Davies.* (5)

Our conclusion is that the plaintiff is entitled to the right of way claimed, as reserved by implication in the conveyance by Miss Alford to the defendant. This involves no difference with the learned judge on the facts, as to which we are, of course, bound by his findings. We differ from him as to the legal inference to be drawn from those facts.

The appeal is allowed, and judgment must be entered in the county court for the plaintiff for an injunction against blocking or otherwise interfering with the plaintiff's right of way, and for damages as prayed, with costs here and below.

To avoid any possible misunderstanding, we add that this judgment does not authorize any user otherwise than as a way.

Appeal allowed.

Solicitors for the plaintiff: *Church, Adams, Tatham & Co., for Withy & Pooley, Swindon.*

Solicitors for the defendant: *Pennington & Son, for Lemon & Humphreys, Swindon.*

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(1) 20 Q. B. D. 225, 230. (2) [1915] A. C. 646. (3) [1921] 1 Ch. 322. (4) [1930] 1 Ch. 493. (5) [1923] 2 Ch. 95, 109, 113.

F. P. F.

STREATHAM CINEMA, LIMITED *v.* JOHN McLAUCHLAN, LIMITED.

1933
June 1.

[1933. S. No. 1486.]

Gaming—Betting—Credit Totalisator—Legality—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 1.

The plaintiffs claimed a quarter's rent in advance for premises let to the defendants to be used by them as a tote [totalisator] club. The defendants pleaded that the contract was unenforceable as made for an illegal purpose—namely, the carrying on of a tote club:—

Held, that a tote club can be conducted in a legal manner on a credit basis, i.e., where no money or valuable thing is staked at the time the bet is made, but all that takes place is that the customer at that time promises to pay if he loses in consideration of the promise that he is to be paid if he wins, and that the plaintiffs were entitled to assume that the tote would be conducted in a legal manner only, and that there was no evidence that they knew that in fact it had been conducted in an illegal manner, i.e., on a cash basis, which, at the date of the quarter's rent becoming due, it had ceased to be.

Shuttleworth v. *Leeds Greyhound Association, Ld.* [1933] 1 K. B. 400 distinguished.

ACTION tried by du Parcq J. without a jury.

The plaintiffs, Streatham Cinema, Ld., were the owners of a cinematograph theatre and the defendants were bookmakers. By a lease dated October 14, 1932, the plaintiffs let the theatre to the defendants for seven years at a rent of 1050*l.* per annum, payable quarterly in advance. The defendants covenanted not to use the theatre in various specified ways from which were excepted the "carrying on of a social or tote [totalisator] club." On December 16, 1932, the Divisional Court held in *Shuttleworth* v. *Leeds Greyhound Association, Ld.* (1), that totalisators conducted on a cash basis were illegal, i.e., where the stake was deposited with the owner of the totalisator at the time of making the bet. The defendants thereupon wrote to the plaintiffs saying that they had been conducting the tote in a manner now held to be illegal, that they did not intend to use the premises henceforth for the purposes of a tote club, and sent back the keys, which the plaintiffs returned. The present claim was for 262*l*. 10*s*., the quarter's rent due in advance on March 25, 1933. The defendants pleaded that the contract was for an illegal purpose—namely, the carrying on of a tote club, and that they were not liable thereunder.

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(1) [1933] 1 K. B. 400.

Beyfus K.C. and *H. J. Wallington* for the plaintiffs. It is admitted that if all totalisators are illegal the plaintiffs' claim must fail. It was decided in *Shuttleworth* v. *Leeds Greyhound Association, Ld.* (1), that totalisators conducted on a cash basis are illegal, i.e., where the stake is paid to the owner of the place where the totalisator is installed, before the determination of the race. But a totalisator conducted on a credit basis, where promises to pay only are exchanged, does not come within s. 1 of the Betting Act, 1853 (16 & 17 Vict. c. 119), because it is not a place used "for the purpose of any money or valuable thing being received by or on behalf of such owner" for the consideration of a promise to pay. The owner only receives a promise to pay as consideration for his own promise to pay. If it be true, therefore, that a totalisator can be carried on in a lawful manner the plaintiffs were entitled to assume that this tote club would be so carried on. It is true that in fact it was not, but there is no evidence that the plaintiffs were aware of that fact. They are therefore entitled to be paid in advance the rent agreed, it being admitted that as from the date when the rent became due the totalisator was no longer going to be carried on in an illegal manner, or, indeed, at all.

Eastham K.C. and *James MacMillan* for the defendants. Totalisators, however conducted, are illegal. The reception of money for the consideration of the promise of the owner of the totalisator, even though paid after the promise, is illegal. Sect. 1 of the Betting Act, 1853, would apply to a credit totalisator as well as to a cash totalisator, for, if not in every case, in most cases, the customer would send some document indicating the horse or dog he wished to back, and that, though not "money," would be a "valuable thing" from the point of view of the owner of the totalisator, in the

(1) [1933] 1 K. B. 400.

event of the customer disputing the making of the bet. The proper inference to be drawn from the evidence is that the plaintiffs knew perfectly well that this tote was to be conducted in the usual and by far the most common way, i.e., on a cash basis.

DU PARCQ J. This is an interesting case and, if I may be allowed to say so, has been argued in such a manner as to give me the greatest possible assistance. The plaintiffs are the Streatham Cinema, Ld., and the defendants are John McLauchlan, Ld. Down to some time in 1932 the plaintiffs had been carrying on a cinema theatre at premises at Streatham; that enterprise had come to an end, and they were minded to let the premises, and found tenants in the defendants. The defendants are a firm described as turf accountants—that is another way of saying bookmakers—and they carry on in New Bond Street the business of what is called, I think, credit bookmaking. It is important to note that the solicitors who were acting for the defendants in negotiating the terms of the lease wrote to the solicitors acting for the plaintiffs on September 28, 1932, a letter in which they said this: "The lessees will be Messrs. J. McLauchlan, Limited, whose registered office is at 11 Duke Street, Edinburgh, and their business address 94 New Bond Street, W. 1.—Description, turf accountants. It appears that our clients are desirous of opening a tote club at the premises, and we presume there is no objection to this." There was no objection to that and, indeed, when the lease was executed (and it is dated October 14, 1932) it contained this clause: "The tenants do hereby for themselves and their assigns covenant with the lessors in manner following, that is to say"; then there is a large number of covenants, and among them this one: "not to permit or suffer any sale by auction to be held," and so forth, and then "nor use or occupy the said premises or permit the same to be used or occupied for any purpose other than as a private residence and/or for the carrying on of a social or tote club or for the purpose of whist drives in a lawful and orderly manner and so that no act or thing whatsoever shall be done committed permitted or suffered in or about the premises or any part thereof which may constitute a nuisance or annoyance or damage to the lessors or other the owners or occupiers of adjoining premises or be in breach of the laws and regulations of the local and other authorities relating to the conduct and management thereof." It is clear, therefore, that the landlords knew that one of the objects for which the premises might be used was that of carrying on a tote club. It was not the only object. If they liked, the tenants could use it as a private residence; they could carry on a social club there; they could hold whist drives there; they were not obliged to have a tote club there at all, but they could without any objection from the landlords, if they were minded so to do, carry on a tote club; and the landlords were told before the lease was executed that they did intend to have on the premises a tote club, which might mean, of course, in conjunction with a social club or in conjunction with a private residence as part of the premises, or might not.

The first question is, Did that fact mean that the lessors were letting the premises for an illegal purpose? If the words used had indicated clearly some use of the premises which everybody would know necessarily to be illegal then, of course, the whole lease would have been void. If, for instance, the premises had been let for the purpose of carrying on the business of selling liquor without a licence, clearly the whole transaction would be void and not a penny of rent could be recovered. On the other hand, if the purpose is one which may be carried out in a perfectly legal manner, or in an illegal manner, then it cannot be said that the agreement is void, because the lessor is entitled to presume that the business will be carried on in a legal and not an illegal manner. It may well be, and probably is, the fact that both the lessors and the lessees were under the impression (which they shared with a great many other people, including many lawyers) that any form of tote club was perfectly legal. The truth is, as we now know by the decision of the Divisional Court in the case of

Shuttleworth v. *Leeds Greyhound Association, Ld.* (1), that some tote clubs at any rate are illegal. Mr. Eastham says that all tote clubs are illegal. Alternatively he says the lessors must have known that this tote club would be illegal, and it is necessary that I should examine those contentions. If all tote clubs are illegal, then Mr. Eastham's clients are entitled to refuse to pay any rent, although in so refusing they may not be acting in a conspicuously meritorious manner.

The question really depends on the interpretation of s. 1 of the Betting Act, 1853. The first few lines of that section Mr. Eastham agrees do not affect this question. It cannot be contended now, at any rate since the decision in the House of Lords in the case of *Attorney-General* v. *Luncheon and Sports Club, Ld.* (2), that where a club has on its premises a totalisator used by members of the club betting among themselves, the club taking a share of the proceeds as its reward for maintaining the totalisator and doing the necessary clerical work, the room or other place where the totalisator is worked is being " kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner," and so on, " betting with persons resorting thereto." So that it is quite plain that it is possible to carry on a tote club without in any way offending against the prohibition in the first part of that section. Then come the words which have to be carefully considered, "or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid." So far as those last words, " or as or for the consideration for securing the paying," and the following words, are concerned, it was only faintly argued by Mr. Eastham that they affected this case at all, and I am unable to see that they do. But as to the other words Mr. Eastham has put forward an extremely ingenious argument which, however, I do not think can succeed. It is perfectly true that many tote clubs, perhaps nearly all tote clubs, are illegal because of the words of the section upon which Mr. Eastham relies. It was held recently by the Divisional Court in the decision to which I have already referred, the case of *Shuttleworth* v. *Leeds Greyhound Association, Ld.* (1), that where a totalisator was installed upon premises and persons resorted to those premises in order to use it, and took tickets and paid for the tickets at the time when they made their bets, then, although they were not resorting to those premises to make bets with the owner or occupier—the House of Lords having already said that they were not doing that—they were nevertheless resorting thereto for the purpose of money being received on behalf of the owner or occupier as consideration for an assurance or undertaking or agreement to pay thereafter money on an event or contingency. But it has been argued by Mr. Beyfus, and I think he is right, that if people choose to carry on a tote club where no money is staked at the time that the bet is made, where no valuable thing is given at the time, and where all that takes place is that a promise is given by the person making the bet that if he loses his bet he will pay at some future time, the premises are not affected, and the action of the proprietor of the premises is not affected, by the prohibition in the Act. Mr. Eastham suggests that such a construction, and such a result, are repugnant to common sense. It may be so. I ventured to say to Mr. Eastham during the course of the argument that I thought that if one tried to be guided by common sense in construing the statutes which govern gaming and wagering in this country, one might find oneself in serious difficulties.

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(1) [1933] 1 K. B. 400.

(2) [1929] A. C. 400.

I can only interpret the law as I find it, and if people think that it ought to be altered, it may be that the Legislature will some day alter it. I think that just as the bookmaker

(1) [1933] 1 K. B. 400.

who gives credit to his customers carries on his business unmolested and is doing nothing illegal, so if people choose to have a tote club upon their premises and take no money and no valuable consideration at the time the bet is made they are not breaking the law. I think that Mr. Eastham's suggested construction is too strained. In my opinion the use of the word "thereafter" where it occurs in the section, shows that what is struck at is the case where money is paid, and at the time the money is paid there is received in return for that money, which is the consideration, a promise to pay money thereafter at some future date when the race has been run, or the fight or game is over and the event determined.

That leads me to the conclusion, that assuming, as I am bound to assume (though it is contrary to the fact no doubt), that the lessor and the lessee knew the law, what they knew was this, that a tote club might be legally carried on and might be illegally carried on. If so, the lessors were entitled to assume that in using the premises as a tote club the defendants would do what could be done to use them lawfully as a tote club; and they were not bound to assume that they would use them illegally as a tote club.

That is not the end of the case, because Mr. Eastham says, quite rightly, that if the plaintiffs knew that although the premises could be lawfully carried on as a tote club they were going to be unlawfully carried on, the defendants would have a good defence. I have already said that I do not think there is any evidence before me that they had notice or knowledge of that.

Now what is the position? The business was no doubt carried on illegally. There is no evidence that the lessors knew that until, it may be, the date in March when by a letter dated March 9, 1933, they learned from their tenants that they had been carrying on the business in an illegal way. It does not even follow from that that they had knowledge, because on March 9 Messrs. McLauchlan might have been wrong in thinking that they had carried on the business illegally, not realizing that it was possible to carry it on lawfully. But let it be assumed that that letter is to be read as an admission that up to that date they had carried it on unlawfully. What happens then? The plaintiffs are also told: "We have up to this date carried on the business illegally. From now we are not going to carry them on illegally. We are not going to carry on a tote club any longer—certainly not an illegal tote club." It seems to me absurd on those facts to say that the effect of that is that the landlord can never have any rent. The tenant writes and says: "You did not know—through my ignorance of the law I did not appreciate it—that I have been carrying on an illegal business on your premises. Henceforth I am going to use them either not at all or certainly for no purpose that is not perfectly lawful." It seems to me it would be surprising if the tenant could properly add: "Therefore in the future I am not going to pay you any rent." In my view that is an impossible conclusion, and I am, therefore, of opinion, in spite of the ingenious contentions forcibly argued by Mr. Eastham, that the plaintiffs are entitled to succeed, and that there must be judgment for the amount claimed, 262*l.* 10*s.*, with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Isadore Goldman & Son.*
Solicitors for defendants: *Thompson, Near & Co.*

W. L. L. B.

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Highway — Footpath — Adjoining Landowner — Application to construct Communication across Footpath—Blackpool Improvement Act, 1879 (42 *&* 43 *Vict. c. cxxix.*), *s.* 62.

Sect. 62 of the Blackpool Improvement Act, 1879, provides that: "Every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street shall first submit to the corporation a plan of the proposed communication, showing where it will cut the footpath, and what provision (if any) is made for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works, and after having obtained the sanction of the corporation may execute the works at his own expense under the supervision and to the satisfaction of the surveyor, and not otherwise, and if any person drives or permits or causes to be driven any horse or vehicle across any footway unless and until such a communication as aforesaid has been so made he shall be liable to a penalty not exceeding five pounds":—

Held (Eve J. dissenting), that on an application by a person for permission under s. 62 to form a communication for horses or vehicles across a footpath to his premises, the corporation was not limited to considering the matters specified in the section—the particular place where, and the details how, the work would be carried out—but was entitled to consider the nature of the proposed user in order to decide whether the proposed paving would be sufficient to support the weight of the vehicles using it and to protect any subjacent pipes; and, further, that the corporation was entitled to consider the safety of the public and the convenience of pedestrians and vehicular traffic. The corporation, however, was not entitled to have regard to the powers which it hoped to obtain under a Town Planning Scheme.

St. Mary, Newington, Vestry v. *Jacobs* (1871) L. R. 7 Q. B. 47; *Tottenham Urban District Council* v. *Rowley* [1912] 2 Ch. 633; and *Curtis* v. *Geeves* (1929) 143 L. T. 48 considered.

Decision of Divisional Court [1933] 1 K. B. 688 reversed.

APPEAL from a decision of the Divisional Court on a case stated by Lancashire Quarter Sessions.

William Marshall and Rhodes W. Marshall, the owners of No. 1 St. Chad's Road, Blackpool, which abutted on the highway, applied to Blackpool Corporation under s. 62 of the Blackpool Improvement Act, 1879, for permission to construct a communication from their premises across the footway to enable their motor and other vehicles to go out and come in. In arriving at their decision to refuse the application the corporation took into consideration not only

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the matters mentioned in s. 62 of the Act of 1879—namely, the point at which the communication would cut the footway, the provision made for kerbing, etc., but also other matters such as the safety of the public and the convenience of pedestrians and vehicular traffic, and further they had regard to the powers which they hoped to obtain under their proposed Town Planning Scheme, whereby that portion of the borough would be zoned for residential purposes only.

The applicants appealed to Quarter Sessions on the ground that the corporation had misdirected themselves, and Quarter Sessions allowed the appeal, holding that the corporation were not entitled in arriving at their decision to take into consideration : (1.) the safety of the public and the convenience of pedestrians and vehicular traffic, and (2.) the powers they hoped to obtain under their proposed Town Planning Scheme. Quarter Sessions, however, stated a case for the opinion of the Court as to whether they were right in so holding.

The Divisional Court held that at common law a landowner has a right of immediate access to the highway ; that s. 62 of the Act of 1879 contained no unequivocal words taking away that common law right of the applicants ; and that as the requirements of the section as to a plan, etc., had been complied with, the corporation had no power to refuse the permission asked for. The Court accordingly dismissed the appeal.

The corporation appealed.

Montgomery K.C. and *Keith Groves* for the appellants. The unlimited right of access which an owner of land adjoining a highway enjoyed at common law was restricted by the Highway Act, 1835. That Act by s. 80 authorized the surveyor of highways to construct footways by the side of carriage ways, and s. 72 made it an offence for any person wilfully to ride upon any footpath. The word "footpath" covers a crossing, and therefore the common law right of riding or driving across a footway was taken away. By s. 144 of the Public Health Act, 1875, the powers of the surveyor of highways became vested in the urban authority, and by s. 149 the streets in an urban district became vested in the urban authority. The same Act incorporated s. 28 of the Town Police Clauses Act, 1847, which provides (inter alia) that "every person who leads or rides any horse or other animal, or draws or drives any cart or carriage, sledge, truck, or barrow, upon any footway of any street, or fastens any horse or other animal so that it stands across or upon any footway," shall be liable to a penalty. Sect. 62 of the Blackpool Improvement Act, 1879, which enables a person to apply for permission to make a communication across any footpath, must be construed in the light of the foregoing enactments, for it is incorrect to say, as the Divisional Court did, that the respondents had, since the Highway Act, 1835, an unrestricted right of access to their premises across the footpath. Any right that a landowner may possess to access to his premises must be exercised reasonably: *Fritz* v. *Hobson* (1); per Cozens-Hardy M.R. in *Tottenham Urban District Council* v. *Rowley*. (2) Of the reasonableness of the access proposed the appellants must be the judges, and in determining what is reasonable they must have regard to the safety of the public, and are not limited to a consideration of the plan of the proposed work, kerbing, etc. Further, the appellants are entitled to have regard to the residential character of the street and the effect thereon of the proposed crossing and traffic over it. The respondents cannot be heard to complain of the bona fide exercise of the appellants' powers: *East Fremantle Corporation* v. *Annois* (3); *Stillwell* v. *New Windsor Corporation*. (4)

[*St. Mary, Newington, Vestry* v. *Jacobs* (5); *Tunbridge Wells Corporation* v. *Baird* (6); *Derham* v. *Culpan* (7); and *Curtis* v. *Geeves* (8) were also cited.]

Eastham K.C. and *T. E. Hinchcliffe* for the respondents. The Highway Act, 1835, has not taken away a landowner's

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(1) (1880) 14 Ch. D. 542.

(2) [1912] 2 Ch. 633, 644; affirmed in H. L. [1914] A. C. 95.

(3) [1902] A. C. 213.

(4) [1932] 2 Ch. 155.

(5) (1871) L. R. 7 Q. B. 47.

(6) [1896] A. C. 434.

(7) Unreported. Decided by Divisional Court (Lord Alverstone C.J., Ridley and Darling JJ.) on October 31, 1906.

(8) 143 L. T. 48.

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right of access to the highway. In *Lyon* v. *Fishmongers' Co.* (1) Lord Selborne said that the authorities recognized a right of immediate access from private property to a public highway as a private right, distinct from the right of the owner of that property to use the highway itself as one of the public: see to the same effect *St. Mary, Newington, Vestry* v. *Jacobs* (2); *Ramuz* v. *Southend Local Board* (3); *Tottenham Urban District Council* v. *Rowley.* (4) That being the state of the law when the Act now being considered was passed, what does that Act do? Sect. 62, which must be construed strictly, merely regulates the respondents' right in the way specified. Why should it deal with gradients, etc., if the appellants have a general control over the crossing? The appellants have been given control of the works, not of the user. The word "sanction" applies only to the plan to be submitted. An intention to take away or interfere with the property or rights of the subject is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms: *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co.* (5) *Curtis* v. *Geeves* (6) has no application. There the appellant was convicted of having driven over a footpath where there was no crossing.

Montgomery K.C. replied.

Cur. adv. vult.

June 19. The following judgments were read :—

Scrutton L.J. This appeal from the decision of the Divisional Court, on a special case stated by Quarter Sessions for the county of Lancaster, raises a question of considerable difficulty and general importance. Though primarily it is only concerned with the construction of a Blackpool local Act, the language of the material section is substantially the same as that of s. 18 of the Public Health Acts Amendment Act, 1907, which may be applied to all urban and rural districts by an order of the Ministry of Health.

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(1) (1876) 1 App. Cas. 662, 684, 685.
(2) L. R. 7 Q. B. 47, 53.
(3) (1892) 67 L. T. 169.
(4) [1912] 2 Ch. 633.
(5) [1919] A. C. 744, 752.
(6) 143 L. T. 48.

To understand the point to be raised, it is necessary to state a few admitted facts not mentioned in the special case. Messrs. Marshall are large charabanc proprietors in Blackpool. They used to park their charabancs when plying for hire in St. Chad's Road, a street opening on to the Promenade at Blackpool. For reasons satisfactory to themselves, they bought premises at the corner of the Promenade and St. Chad's Road, which had previously been an apartment house with a garden in front enclosed by a wall with no opening in it for the entrance and exit of vehicles. Round the wall outside ran a paved and kerbed footpath constructed by, and under s. 149 of the Public Health Act, 1875, the property of, the Blackpool Corporation. Marshalls proposed to use this garden as a standing place for their charabancs plying for hire, which, of course, would need to enter and leave the garden through an opening in the wall and an approach through the footpath, which, having a drop at the kerb to the road of some five inches, would need to be reconstructed. Sect. 62 of the Blackpool Improvement Act, 1879, reads as follows: [The Lord Justice read the section.] Accordingly, on April 11, 1931, Marshalls applied to the corporation, as shown by a letter of that date written by the solicitors: "We hereby make application on behalf of our clients, Messrs. W. & W. R. Marshall, for a crossing in St. Chad's Road, Blackpool, as indicated in red upon the plan deposited herewith. This crossing is required for the access of motor and other vehicles to the forecourt of our clients' premises."

A plan was deposited, of which we are furnished with a copy, which may not be the only plan, as it does not show "what provision (if any) is made for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works" as required by the Act. The corporation did not sanction the proposed communication, and under s. 111 of the Act Marshalls appealed to Quarter Sessions.

Quarter Sessions allowed the appeal, subject to a case stated. The case stated as the reason of the allowance of the appeal that the corporation had misdirected themselves and had taken into account matters they were not entitled to consider—namely, matters outside s. 62 of the Act of 1879, which were not specifically mentioned in that section. Clause 6 of the case reads as follows: "The Court of Quarter Sessions were of opinion that the respondents, the said corporation, in arriving at a decision upon the said application were not entitled to consider any matters other than those specifically mentioned in s. 62 of the Blackpool Improvement Act, 1879, and the Court of Quarter Sessions allowed the said appeal upon the ground stated by the chairman thereof and hereinbefore set forth. The question for the opinion of the Court is whether the Court of Quarter Sessions were right in allowing the said appeal upon the said ground."

On the matter coming before the Divisional Court, they remitted the case that Quarter Sessions might state what matters the corporation had considered which they were not entitled to consider. Accordingly, Quarter Sessions further stated the following two matters: "(1.) That the Town Planning and By-laws Sub-Committee of the Blackpool Corporation had taken into consideration matters in regard to the safety of the public and the convenience of pedestrians and vehicular traffic which might use St. Chad's Road; (2.) That the Sub-Committee had regard to certain powers which they hoped to obtain under their proposed Town Planning Scheme whereby this portion of the borough would be zoned for residential purposes only. The Court of Quarter Sessions express regret that it should have caused confusion by the way in which their decision was announced, and under the circumstances it may be better to state what took place in the discussion between the magistrates in private in arriving at their decision"; and added: "Views were expressed as to the desirability of the crossing in question, but the magistrates came to no decision on that point, because it having been held in law that the owners of land and premises abutting on the highway have an absolute right of access to the highway, this right was not taken away by the Blackpool Improvement Act, 1879. The justices realized that the right of access must be used reasonably and any misuse of this right in regard to the safety of the public could be dealt with under the general law."

Counsel for Marshalls before us and in the Divisional Court recognized that while Quarter Sessions set aside the refusal by the corporation of the proposed communication, they had not decided to grant it, and that the matter would have to go back to the corporation for approval. It is unfortunate that Marshalls did not act on that view, but proceeded to make the communication without the sanction of the corporation. This, I think, was quite wrong, but it is not necessary for this Court to decide this, in dealing with the question in the special case.

It is clear that at common law a frontager had the right of entrance and exit from his land on to a high road at any point. But the position became different when the local authority had vested in them the surface of the highway by s. 149 of the Public Health Act, 1875, and when under various Acts they constructed and maintained thereon footpaths which were their property. I accept the relations of frontagers and the public in regard to access over footpaths as carefully stated by Cozens-Hardy M.R. in *Tottenham Urban District Council* v. *Rowley* (1) and approved by the House of Lords. (2) He said: "The owner of adjoining land has a private right attached to his property to gain access to the highway. This is a right which must be reasonably exercised so as not to interfere with the reasonable exercise by the public of their rights of way. . . . . The rights of the public are subject to the reasonable exercise by the adjacent owner of his private rights." In that case there was no made footpath and no question, therefore, of the circumstances under which the adjoining owner could cut into or do away with a made footpath so as to allow his vehicles convenient egress. It appears to me that s. 62 of the Blackpool Act does in clear words limit the rights of the adjoining owner. It provides that he shall be liable to a penalty if he drives a vehicle across a footpath unless and until a communication from his premises to the street has been sanctioned by the corporation and made at his expense under their supervision and to their satisfaction.

(1) [1912] 2 Ch. 633, 644.

(2) [1914] A. C. 95.

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The question then arises, and is the question submitted by the special case, is the corporation limited to considering the matters specified in the section : place and details of works, or may they consider other matters such as the safety of the public, and the nature of the user ? It seems to me they must be entitled to know the nature of the user in order to decide whether the proposed paving is sufficient to support the weight of the vehicles crossing it, and to protect pipes underneath from damage. A heavy vehicle, such as did damage to the pavement in *St. Mary, Newington, Vestry* v. *Jacobs* (1), or a heavy charabanc, must require a suitable pavement to cross. It seems to me that the corporation must be entitled to consider the safety of the public and the convenience of pedestrians and vehicular traffic. To take a possible case : Marshalls, using their forecourt as a stand for charabancs plying for hire, may very naturally pull down their frontage wall so as to give free access to intending passengers all round their land. This they can do without the necessity of any assent by the corporation. If they follow this by an application to remove the pavement all round their frontage so that charabancs may leave at any point, this application, if granted, would deprive the pedestrian using the street, for a very considerable distance, of a pavement on which he could walk and a kerb which would protect him from swerving or skidding vehicles.

The Divisional Court have taken the view that there are no clear words in s. 62 to deprive the frontager of his right to leave his land where he likes, but in my view the last part of this section does deprive the frontager of the right to leave his land and cross the pavement except in places and manner approved by the corporation. This, however, does not in my opinion entitle the corporation to say : "You, the frontager, shall not bring vehicles out of your land at any point at all," though they are entitled to consider the safety of the public in selecting the point at which he may have egress or ingress. On this point I think Quarter Sessions were wrong. But on the second point of construction, in my opinion, Quarter Sessions were right. The corporation refused all access to the street from Marshall's property as a public garage because they expected to get powers to treat St. Chad's Road as a residential district only. This, I think, would be to use s. 62 for a purpose for which it was never intended—namely, to restrict the user of property apart from the question of its exits and entrances to the highway. If the corporation acted on this ground, as Quarter Sessions find, the corporation did consider matters which they ought not to consider, and their refusal cannot be supported. But Quarter Sessions did not consider what order should be made if the use of the property was to be disregarded, but the public safety considered.

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(1) L. R. 7 Q. B. 47.

The application must therefore go back to the corporation to consider on the lines indicated. They must not have regard to the user of the property itself, as contrary to any prospective Town Planning Scheme, and they must not use the safety of the public as a reason for prohibiting all ingress or egress. But they may consider what communication is reasonable, having regard, on the one hand, to the safety of the public, on the other hand to the rights of the frontager. For instance, the frontager asks for a 38 foot exit, considerably more than the width of two charabancs abreast. This may or may not be excessive.

I only think it necessary to refer to two of the cases cited. In *Derham* v. *Culpan* (1) in 1906, the Divisional Court had before them a case stated by magistrates who refused to convict, under the Blackpool Act, a garage owner, who, having been refused a communication across the footpath by the corporation, drove a car from his premises over the footpath and was summoned by the corporation. The magistrates stated a case which was heard, only one side, the corporation, appearing. The Court took the view that the local Act did give the power to the corporation, subject to appeal to Quarter Sessions, to stop a frontager from bringing a vehicle from his land over the footpath to the high road. The Court was not referred to earlier cases, and

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(1) Unreported.

I think the decision, which in effect empowered the corporation to deprive a landowner of any access from his premises to the high road, was wrong; as was the decision of Quarter Sessions following it, in *Brunswick Property Co.* v. *Blackpool.* (1)

I have some difficulty in following the recent decision of the Divisional Court, containing two members of the Court in the present case, in *Curtis* v. *Geeves.* (2) The summons was under the City Police Act, 1839, for driving a carriage so that it could stand upon or across the footway. The National Provincial Bank had a building in Threadneedle Street, with a courtyard, and there was no means of vehicular access from the street to the courtyard except over the footway. A servant of the bank, with its authority, drove a car over the footway into the courtyard; he was summoned under the Police Act and was convicted. On special case the conviction was affirmed. Though the appellant was only exercising the right of a frontager to pass from the street into his premises, the courtyard, by the only possible way of access, Avory J. said that to escape conviction the appellant must show either a constant use of the footway for vehicular traffic, or that the courtyard was built for that purpose. I have been unable to follow the source from which the learned judge obtained these grounds for the right of the adjoining owner to cross the footpath in the only available way, the grounds being (1.) continuous previous user, (2.) original construction on the frontager's land, or why the Court deprives the frontager of access to his land by the only available way, and I do not follow how *Geeves* v. *Curtis* (2) is consistent with the decision appealed from.

I have stated the view I take of the position in Blackpool. I think the decision of Quarter Sessions must be affirmed on its second ground but differed from on its first ground, and therefore the case must go back to the corporation to reconsider the application on the lines that they cannot deprive the applicant of all access to or from his premises, but may consider the nature of the user and the safety of the public in determining what access is to be allowed.

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(1) Unreported. Preston Quarter Sessions, 1907.

(2) 143 L. T. 48.

As the corporation has partly failed and partly succeeded there should be no costs here, or in the Divisional Court, or at Quarter Sessions.

SLESSER L.J. This is an appeal from a judgment of the Divisional Court upon a case stated from the Court of Quarter Sessions for the County Palatine of Lancaster. The facts, as appear in the case, have been stated by Scrutton L.J. and I need not repeat them.

By s. 111 of the Blackpool Improvement Act, 1879, "any person deeming himself aggrieved by any order or determination of the corporation" may appeal to the Court of Quarter Sessions; and in this case, as the case stated recites, two persons, William Marshall and Rhodes William Marshall, had applied to the Blackpool Corporation under s. 62 of the said Act of 1879 for permission to construct a communication across the footpath at and from No. 1 St. Chad's Road, Blackpool. Messrs. Marshall were the owners of No. 1 St. Chad's Road, and their premises adjoin that highway.

Sect. 62 of the 1879 Act, under which their application was made, is in the following terms. [The Lord Justice read the section and continued:] The corporation refused their sanction under the section, and Messrs. Marshall, in their appeal, raised the point at Quarter Sessions that the corporation, in coming to their determination, had wrongfully taken matters into consideration other than those specifically mentioned in the section. The Divisional Court remitted the matter to Quarter Sessions in order that they might state specifically what matters the corporation had, in their view, wrongfully taken into consideration and received reply by way of further case stated as follows: "That the Town Planning and Bylaws Sub-committee of the Blackpool Corporation had taken into consideration matters in regard to the safety of the public and the convenience of pedestrians and vehicular traffic which might use St. Chad's Road. That the sub-committee had regard to certain powers which they hoped to obtain under their proposed Town Planning Scheme whereby this portion of the Borough would be zoned for residential purposes only."

The question which we have to determine is whether the corporation was, or was not, entitled to take these two objected matters into consideration. It was argued for the owners before us that, in so far as at common law and by statute, apart from the provisions of the 1879 Act, the owners were entitled to access to the highway from their property, the section which deprives them of their rights should be construed strictly and that, when it was so strictly considered, in so far as the owners have to submit a plan showing where the proposed communication will cut the footpath and what provision is made for kerbing and crossing and the dimensions and gradients of the necessary works, these matters, and these only, are fit subjects for the corporation's consideration in granting sanction. On the other hand, it was contended for the corporation that the common law right of access had been cut down by statutory enactment, in particular by s. 72 of the Highway Act, 1835, which imposes penalties on persons who drive a carriage on a footpath, and by s. 171 of the Public Health Act, 1875, which applies the Town Police Clauses Act, 1847, to urban authorities, which Act by s. 28 imposes penalties on every person who drives any carriage upon any footpath of any street, and that s. 62 of the Blackpool Act should be construed liberally having regard to those provisions.

Mr. Montgomery laid great stress upon s. 149 of the Public Health Act, 1875, which provides, first, that all streets which become at any time highways repairable by the inhabitants at large within any urban district and the pavement stones and other materials thereof shall pass in and be under the control of the urban authority and that any person who, without the consent of the urban authority, wilfully displaces or takes up or injures the pavement stones shall be liable to a penalty. A similar vesting provision was contained in s. 98 of the Metropolis Management Act, 1855, which required the vestries in the metropolis to cause the streets to be paved; but these provisions can only apply subject to the rights of the owners, and the question remains what those rights of owners now are.

In *St. Mary, Newington, Vestry* v. *Jacobs* (1) the prohibition was (5 & 6 Will. 4, c. 50, s. 72): "If any person shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot-passengers . . . . or shall cause any injury or damage to be done to the highway . . . ." he is made liable to a penalty. The Court said: "We think that the provisions of the Highway Acts and the Metropolis Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner," but continued: "We do not deny that the owner cannot derogate from the grant of roadway made by him to the public, and cannot do anything which would really and substantially interfere with the right of passage by the public."

The problem is much clarified in my mind by a decision of this Court in *Tottenham Urban District Council* v. *Rowley*. (2) As to that case, it is to be observed, distinguishing it from the present, that although a plan contemplated a part of the public property for a footpath, there was at the time of action no pavement actually laid, and that in that case, while there was prohibition in the section of the local Act preventing persons driving vehicles across a footway until a communication had been made as provided in that section, a provision similar to the present, the approval in that case was in terms said to be, not of the making of the communication, but of the plan; so that, if anything, it is an Act less restrictive, on the face of it, of the right to make a communication than the Blackpool Act, for in Blackpool the sanction of the authority is required for the making of the communication, whereas in the *Tottenham* case (2) that which had to be approved was the plan showing where the communication would cut the footpath. Nevertheless, in that case, the rights of the owner were found to be limited. They are stated to be, per Cozens-Hardy M.R. (3), rights "which must be reasonably exercised so as not to interfere with the reasonable exercise by the public of their rights of way"; and again: "In my opinion the rights of the public are subject to the reasonable exercise by the adjacent owner of his private rights."

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(1) L. R. 7 Q. B. 47, 53.

(2) [1912] 2 Ch. 633.

(3) Ibid. 644.

These two cases, the *St. Mary, Newington*, case (1) and the *Tottenham* case (2), support the view that the owner must not do anything which would really and substantially interfere with the right of passage by the public, and I approach the question here, whether the owner's rights are improperly invaded by giving a construction to the section wider than limiting the corporation to a consideration of where the communication will cut the footpath, kerbing, paved crossing, dimensions and gradients, by assuming that, apart from the section, the owner's right is not one to interfere with the reasonable passage by the public. In *Curtis* v. *Geeves* (3) (though in some respects difficult to understand) it is material to remember that Lord Hewart C.J. said (4): "It is true that the case finds that at the particular time when the alleged offence was committed there were no pedestrians on the footway, and the right of passage by the public upon the footway was not at that moment interfered with, nor is it claimed by Mr. Roberts that the appellant is entitled to use this footway at any time in such a way as to interfere with the right of passage by the public."

Coming to s. 62 of the 1879 Act, it is to be observed that, in its last limb, it contains a direct prohibition on any person to drive a vehicle across a footway, until a communication has been made, and that, as I have already pointed out, the sanction of the corporation is not in terms limited to any specific matters, but having regard to the language used in the *Tottenham* case (2), that s. 62 of that Act "seems to recognize and at the same time to regulate the right to cross a kerbed footway," and to the general canons of construction mentioned in the Divisional Court as to the Court leaning against the view that there is an intention to take away the right of

(1) L. R. 7 Q. B. 47.
(2) [1912] 2 Ch. 633.
(3) 143 L. T. 48.
(4) Ibid. 49.

the subject without compensation, I nevertheless arrive at the opinion that the corporation may properly take into account the safety of the public and the convenience of pedestrians and vehicular traffic which might use St. Chad's Road, as a matter which may be outside the rights of access of the owner, if the view be taken, as I take it, that his right of access must not interfere with the reasonable exercise by the public of their right of way. Subject to this consideration I agree that he is entitled to some reasonable access.

I disagree, therefore, with the Divisional Court and think that Quarter Sessions were wrong in thinking that the corporation might not take into account those matters.

On the other hand, it appears from their answers when the case was remitted to Quarter Sessions, that the corporation also took into account another matter—namely, that they "had regard to powers which they hoped to obtain under a proposed Town Planning Scheme which would make this portion of the borough usable for residential purposes only." In doing this, I think that they were exceeding the ambit of s. 62, for, as I have indicated, I do not give it that extreme breadth of construction contended for by the corporation, but rather a construction lying between those suggested by the two parties; that is to say, I think that the owner's obligation not to interfere with the exercise by the public of their rights of way does not extend to an obligation so to use his right of access as not to injure contingent future rights of the public with specific amenities, which it is contemplated now or hereafter may be preserved.

The result is that the corporation, in my opinion, has taken into account one matter which Quarter Sessions and the Divisional Court think should be excluded, but which I think was proper, and one matter which I agree with the Courts below ought to have been excluded.

In the result, the case must be remitted to the corporation for their reconsideration as a whole, and in that reconsideration they may have regard to matters affecting the safety of the public and the convenience of traffic which may use St. Chad's Road, but should not have regard to

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their proposed Town Planning Scheme or any contemplated use of the portion of the borough round St. Chad's Road for residential purposes only.

EVE J. In this case I have the misfortune to differ from the conclusion arrived at by the other members of the Court. I think the appeal ought to be dismissed on the grounds stated in the judgments in the Divisional Court. The facts are not in dispute and the authorities—which, in the main, support the views put forward on the part of the owners—have been so fully dealt with that I do not think it is necessary to make further reference to them.

The question turns upon the construction of s. 62 of the Blackpool Improvement Act, 1879, passed at a time when admittedly the owner of land adjoining a footpath forming part of a highway had an absolute right attached to his property to gain access to the highway at any point. Does this section, which in terms makes any person who drives or causes to be driven any horse or vehicle across any footway unless and until such a communication for horses or vehicles as is therein provided for has been made liable to a penalty not exceeding 5*l.*, transfer from the owner of the land to the corporation the selection of the point at which access is to be had ?

If so, it is a serious invasion of the owner's rights, controlling him in the development of his property, in the selection of the site for the various erections he may contemplate making thereon—stable, warehouse, garage, store, and the like—not in all cases but only in those where the proposed access will involve the crossing of a footpath. The construction involves an intention to interfere with a class of individuals—those whose property is separated from the vehicular part of the highway by a footpath—which one would expect to find expressed in plain and unequivocal terms, not left to be deduced from the concluding words of a section which in its earlier part purports to lay down the conditions upon which a communication across a footpath may be made and then concludes with words imposing a penalty for user if such conditions have not been complied with. I cannot bring myself to accept the view that the concluding words of the section were ever intended to control or affect the owner's right to select the point of egress from his land.

In my opinion s. 62 does not expressly or by implication abrogate or limit the absolute right of the owner to gain access to the highway at any point he may select. I construe it as imposing on the owner who is desirous of exercising this right at a point which involves the crossing of a footpath an obligation to satisfy the corporation, by the details enumerated in the section, that the proposed crossing or communication is one which will not interfere with the reasonable exercise by the public of their rights of way, that is to say, with those public rights to which the owner's right of access is already admittedly subject. In other words, the operation of the section, as was well said in the course of the argument on the part of the owners, is to regulate the exercise of the right in particular circumstances (that is to say, the existence of an intervening pathway) but not to limit or restrict it.

The plan and statutory details to be furnished therewith disclose to the corporation and their surveyor all that is required to indicate the position that has been selected and to determine whether its construction will constitute an unreasonable interference with the rights of pedestrians.

In this connection, it must be borne in mind that every additional access opened on to the highway and more or less at right angles to the stream of traffic passing on foot and in vehicles along it must to some extent add to the stream and in so doing possibly make progress a little more difficult, but this result would not in ordinary circumstances make the traffic contributed by those making use of the new access an unreasonable interference with the rights of the pedestrian. It is certainly open to the corporation to consider whether there is anything in the formation of the communication calculated to endanger the safety, or to interfere to an unreasonable extent with the comfort, of pedestrians passing along the footpath. As regards the strength of the communication they can, of course, take the opinion of their surveyor and insist upon adequate provision being made in this respect for any possible increase in the weight of traffic.

I am quite unable to appreciate upon what satisfactory grounds the contention that the corporation are entitled under s. 62, or otherwise, to take into consideration the safety of the users—on foot or vehicular—of the highway to which the owner desires to have access is founded. That contention would appear to lead to the conclusion that the more attractive the highway to which the owner desires to have access the less likely is he to obtain it. Moreover, it ignores the fact that when the owner emerges from his own land he becomes an ordinary wayfarer, amenable to all the statutes, ordinances, and by-laws regulating traffic in the borough, and that if he endangers life or limb, or otherwise disregards the regulations, means are available for compelling him to be more careful for the future.

The result is that in my opinion the decision of the Divisional Court is right and ought to be affirmed.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for D. L. Harbottle, Town Clerk, Blackpool.*

Solicitors for respondents: *Johnson, Peacock & Co., for James E. Harrison, Blackpool.*

J. S. H.

FULHAM BOROUGH COUNCIL *v.* SANTILLI.

1933
May 12.

Metropolis—Street Trading—Regulation of—Licence—Grounds for Refusal—Street not "ordinarily prescribed" for Trading—Appeal—Jurisdiction of Appellate Tribunal—London County Council (General Powers) Act, 1927 (17 *&* 18 *Geo.* 5, *c. xxii.*), *s.* 31, *sub-ss.* 2, 3 ; *s.* 35.

Where an application for a street trading licence under the London County Council (General Powers) Act, 1927, has been refused by the borough council on the ground mentioned in s. 31, sub-s. 2 (*c*)—namely, that the street to which the application relates is not a street ordinarily prescribed by the borough council, and the applicant appeals under s. 35 to a petty sessional court, that court is not restricted to an inquiry whether or not the street is a street ordinarily prescribed by the borough council, but has power to consider whether it would be reasonable to grant the licence in all the circumstances of the case.

Case stated by a metropolitan police magistrate.

At the West London Police Court, before the magistrate, Mr. Bingley, a complaint was preferred by Phyllis Santilli (hereinafter called "the respondent"), under s. 35, sub-s. 2 (1),

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(1) The London County Council (General Powers) Act, 1927, provides:

Sect. 31: "(2.) The borough council shall as soon as reasonably practicable after the receipt of an application under the provisions of this section grant or renew a licence to the applicant under and for the purposes of this Part of this Act. Provided that the borough council may refuse to grant or renew a licence or may at any time revoke or vary a licence granted to any person if—

(*a*) on account of misconduct or for any other sufficient reason he is in their opinion unsuitable to hold such licence; or

(*b*) the space available in the street or streets or area to which the application relates or which is or are prescribed by the licence is at the date of such application or becomes at any time after the grant of such licence insufficient for the selling or exposing or offering for sale by the applicant or licensee of any articles or things under the authority of a licence under this Part of this Act or of the particular articles or things referred to in the application or licence without causing undue interference with or inconvenience to the traffic in such street or streets or area; or

(*c*) the street or streets to which the application relates is or are not a street or streets ordinarily prescribed by the borough council in licences granted by them pursuant to this Part of this Act;

but shall not refuse to grant or renew a licence or revoke a licence on the ground only that the applicant for or holder of the licence does not reside in their metropolitan borough. Provided also that the operation of this sub-section shall be subject to the provisions of the section of this Act of which the marginal note is 'For preventing interference with traffic.'

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of the London County Council (General Powers) Act, 1927, against the Council of the metropolitan borough of Fulham (hereafter called " the appellants "), that she was a person aggrieved by the decision of the borough council refusing to grant her a licence under Part VI. of the Act to sell, expose, or offer for sale articles from a barrow occupying a stationary position in a street, and that she desired to appeal to that court against the decision in accordance with the above mentioned sub-section.

On November 15 and 29, 1932, the complaint was heard by the magistrate, when the following facts were proved or admitted :—

The respondent had sold ice cream from a barrow at the corner of Bishop's Park Road and Stevenage Road, outside Bishop's Park, in the borough of Fulham, between March and September during each of the last seven years, and ice cream had been sold from the same barrow and at the same place between March and September for each of the twenty-one years previous to that, and no nuisance or obstruction had been caused. In October, 1927, the appellants received a petition signed by fifteen residents in Stevenage Road urging that no licences be granted for any stationary

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" (3.) Any such licence shall be in a form prescribed by the Secretary of State and may prescribe—

(*a*) the street or streets or area in which and the position or place in any such street or area at which the licensee may sell or expose or offer for sale articles or things as aforesaid ; . . . .

and on any occasion of the renewal of a licence the borough council may vary such prescriptions."

Sect. 35 : " (1.) If any borough council refuse to grant or renew a licence or revoke or vary a licence under this Part of this Act they shall if required by the applicant or holder (as the case may be) deliver to him within seven days of the receipt of such requirement particulars in writing of the ground or grounds for such refusal revocation or variation.

" (2.) Any person aggrieved by such refusal revocation or variation or by any prescription made by the borough council under subsection (3.) of the section of this Act of which the marginal note is 'Applications for licences &c.' may appeal to a petty sessional court provided that such appeal is made within fourteen days from the date on which such refusal revocation variation or prescription is notified to him and that notice in writing of such appeal is sent to the borough council not less than seven days before the hearing thereof and the court may make such order as it thinks fit and may award costs."

barrow in that road, and in May, 1928, they received a further petition signed by twenty-five residents in Bishop's Park Road protesting against any action being taken to remove the respondent's barrow.

In December, 1931, the respondent applied to the appellants under Part VI. of the Act of 1927 for a licence to trade from the position referred to. That application was refused, and the respondent did not appeal against that refusal. The respondent had often been warned to move from the position in question—once or twice by the appellants' inspector—and if she saw the inspector she used to move the barrow a little way along, keeping near the Park.

On September 26, 1932, the respondent was summoned at the West London Police Court for the offence of exposing for sale ice cream from a barrow at the place in question without a licence under the Act, and was bound over in the sum of 40*s*. for six months.

On September 30, 1932, the respondent again applied to the appellants for a licence to trade from the barrow in the position referred to, and on October 7, 1932, her solicitor applied to be heard in support of her application. On October 11, 1932, the respondent's application was considered by the appellants, and, without hearing the respondent or her solicitor, the appellants refused to grant the licence applied for on the ground that the streets to which the application related were not streets ordinarily prescribed by the appellants in licences granted by them pursuant to Part VI. of the Act. These streets had not been prescribed in any licences granted by the appellants pursuant to the said Part of the Act, but the appellants had granted twenty-two licences for street trading from various isolated positions in other streets in the borough for special reasons, and three of these licences had been granted to members of the respondent's family. A large number of residents in the neighbourhood were strongly in favour of the respondent being granted a licence, but these residents would take strong objection to the granting of other licences in the streets referred to.

On the part of the appellants it was contended that the appeal to the magistrate was restricted to an inquiry whether the streets to which the application for the licence related were or were not streets "ordinarily prescribed" by the appellants in licences granted by them pursuant to Part VI. of the Act, and that the magistrate had no discretion to order the grant of a licence in respect of a street which the appellants had never prescribed in any licence granted by them pursuant to Part VI. of the Act, and the attention of the magistrate was particularly directed to s. 31, sub-s. 2 (*c*), of the Act.

On the part of the respondent it was contended that the appeal was not so restricted, but that the magistrate's discretion was unfettered; and the magistrate's attention was particularly directed to the words "and the court may make such order as it thinks fit" in s. 35, sub-s. 2, of the Act.

The magistrate was of opinion that his discretion was not restricted as the appellants contended, and he accordingly allowed the appeal and ordered the appellants to grant the licence applied for by the respondent.

For the further information of the Court the magistrate stated that in coming to his decision he took into consideration the following circumstances: that the appellants had delayed action against the respondent for five years since the Act came into force on November 1, 1927; that there was no evidence before him that the respondent's application had been judicially or seriously considered by the appellants, and that neither she nor her solicitor was afforded an opportunity of appearing on her application; that a mass of evidence from dwellers in the neighbourhood and from past and present members of the police force was put before him to the effect that the respondent caused no nuisance or obstruction and that her stall was of great use and advantage to poor children frequenting the adjacent Park; that the appellants called no evidence in contradiction of the matter referred to in the last foregoing statement, but relied solely on s. 31, sub-s. 2 (*c*), of the Act; that in his view the appellants could not, consistently with their action in other cases, avail themselves of this plea, having already granted twenty-two similar licences to single traders in streets that were not "ordinarily prescribed by the borough council in licences granted by them," and in no such case had a street market developed from the issue of the licence; and that the surveyor to the borough council testified that in granting these twenty-two single licences the council had taken into consideration the length of time the applicants had had their stands, their financial position, and their character, and that there was no evidence before him that the appellants took any of these matters into consideration in refusing the present application.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct decision and determination in law.

Trustram Eve (*W. E. P. Done* with him) for the Fulham Borough Council, appellants. The magistrate was wrong in allowing the appeal of the respondent against the decision of the appellants. Where an application is made to a borough council for a street trading licence under the London County Council (General Powers) Act, 1927, the borough council may refuse to grant the licence to the applicants on one or more of the grounds specified in that section, and where they have refused to grant the licence on one or more of these grounds and the applicant appeals to a petty sessional court, that court can consider none of the grounds of refusal except such of them as were relied upon by the borough council. This appears from the provisions of the Act. Thus, s. 35 provides by sub-s. 1 that if the council refuse to grant or revoke or vary a licence they shall if required by the appellant deliver to him particulars of the ground or grounds for so doing, and by sub-s. 2 that any person aggrieved by such refusal revocation or variation or by any prescription under s. 31, sub-s. 3, may appeal to the petty sessional court; and the inclusion of these provisions in the same section tends to show that on an appeal from the council to the petty sessional court, that court can only consider the grounds on which the

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council acted under s. 31. The words in s. 35, sub-s. 2, "the court may make such order as it thinks fit" must be subject to some limitation. They would not, for example, enable the court to make an order for a licence fixing different days and times from those prescribed in a form of licence approved by the Secretary of State under s. 31, sub-s. 3 (*c*). The words "as it thinks fit" are governed by the preceding statement that the court may make an order, and should be treated as surplusage. These words of s. 35, sub-s. 2, are followed by the words "and may award costs," which would hardly have been necessary if the petty sessional court had power to deal with all the grounds of refusal and other matters relating to the application for a licence. If the petty sessional court had the unfettered discretion contended for, it might disregard grounds for refusing the licence which had been firmly established before the council and consider other grounds which the council for good reason had rejected. A borough council in dealing with an application for a licence of this kind is an administrative and not a judicial body: *Rex* v. *Lewisham Corporation. Ex parte Jackson* (1); and, that being so, it cannot be intended that a petty sessional court in dealing with an appeal from the council should have unlimited judicial powers. In *Clifton* v. *Holborn Borough Council* (2) the only question dealt with on the appeal to the magistrate was whether or not the borough council should have refused the licence on the ground with which they dealt. In the present case the appellants refused the application of the respondent for a licence only on the ground mentioned in s. 31, sub-s. 2 (*c*), of the Act—namely, that the streets to which the application related were not streets ordinarily prescribed by the appellants in licences granted by them pursuant to the Act, and they did not consider any of the other grounds mentioned in that section. The learned magistrate in dealing with the appeal from the appellants could consider only the ground on which the refusal of the appellants to grant the licence was based, the sole question for him being whether or not these streets had in fact been ordinarily prescribed by the appellants. It appears, however, from the case stated that the magistrate did not confine himself to the ground on which the appellants based their refusal, but improperly took account also of other grounds mentioned in s. 31, and, further, that he dealt not with the question whether the streets had in fact been prescribed, but with the very different question whether they ought to have been prescribed. Moreover, the appellants rightly refused the application on the ground mentioned in s. 31, sub-s. 2 (*c*), because these streets had not in fact been ordinarily prescribed, and indeed had not been prescribed at all, by the appellants in licences granted by them, and the decision of the magistrate, if it implies, as apparently it does, that the streets had been prescribed, is plainly contrary to the fact. For these reasons this appeal should be allowed, and the order of the magistrate directing the appellants to grant the licence should be set aside.

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(1) (1929) 93 J. P. 171.

(2) (1929) 93 J. P. 196.

Wilfrid Lewis, as amicus curiae, expressing the view of the Secretary of State for the Home Department in support of the decision of the magistrate. The decision of the magistrate allowing the appeal from the present appellants and directing them to grant the licence applied for by the respondent was right and should be upheld. It is contended on behalf of the appellants that on an appeal under s. 35 of the Act of 1927 from the refusal of a licence by the borough council to a petty sessional court, only such of the grounds specified in s. 31 as the refusal was based upon can be taken into consideration. Sect. 35, if so construed, would not provide the public with a sufficient safeguard by way of appeal against the unreasonable refusal by a borough council of street trading licences, and the intention of the Act would be in great measure frustrated. For example, according to that construction of the section, where the council had refused the licence on the ground mentioned in s. 31, sub-s. 2 (*a*)—namely, that the applicant had been guilty of some misconduct, that ground only could be considered on the appeal, though the misconduct had been very trivial and the need of the district for a licence might be urgent;

and a corresponding unsatisfactory result might follow where the refusal had been based on the ground mentioned in cl. (*b*) of that sub-section. On the true construction of s. 35 and the other relevant provisions of the Act, when an appeal from the refusal of a licence by the borough council comes before a petty sessional court, that court has jurisdiction to consider not merely whether the particular ground of refusal was sufficient, but whether the refusal was reasonable in all the circumstances of the case. The functions of the council under the Act being merely administrative: *Rex* v. *Lewisham Corporation. Ex parte Jackson* (1), it is not without reason that that power is given to the appellate court. As the Act does not restrict the council on the hearing of the original application to a consideration of any one or more of the statutory grounds, it cannot be supposed that it restricts the petty sessional court on the hearing of an appeal from the council to any one of these grounds. Sect. 35, sub-s. 2, provides that a person aggrieved may appeal, and shows that he may be aggrieved not only by the refusal, revocation or variation of a licence under s. 31, sub-s. 2, but also by any prescription under s. 31, sub-s. 3, of any street or place where a licensee may set up his stall, whether it be ordinarily prescribed or not. On the hearing of the appeal the magistrate could not say that a street was ordinarily prescribed which had not been prescribed, but he could say that the fact that it had not been prescribed was not a ground for refusing the licence if it could reasonably be granted. From the two cases cited it appears that the magistrate, on the hearing of the appeal, may deal with the case for the purpose of discovering not merely whether the ground on which the council had refused the licence was sufficient, but whether in all the circumstances the council had acted reasonably in refusing the licence. In the present case it was reasonable in the circumstances that the licence should be granted.

Trustram Eve in reply. Even if it be correct to say that, where the district council have refused a licence on one or other of the grounds set out in s. 31, sub-s. 2 (*a*) and (*b*), an appeal from their decision to a petty sessional court may not be limited to the questions of fact involved in these grounds, it does not follow that where the council have refused the licence on the ground set out in cl. (*c*) of that sub-section an appeal to the petty sessional court is not limited to the question of fact whether the street has been prescribed or not; because there is this distinction between clauses (*a*) and (*b*) on the one hand and cl. (*c*) on the other hand, that the two former clauses involve grounds of both fact and opinion, whereas the last clause involves fact only. It is not correct to say that by virtue of s. 35, sub-s. 2, and s. 31, sub-s. 3, any question as to the prescription of a street is matter of appeal whether the street be one which is ordinarily prescribed or not, because the latter sub-section applies only where a licence has already been granted prescribing the street. These provisions do not give the magistrate power on an appeal from the refusal of a licence on the ground mentioned in cl. (*c*) to direct the grant of a licence prescribing a street for the first time.

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(1) 93 J. P. 171.

LORD HEWART C.J. In spite of various matters contained in the case stated, the argument of Mr. Wilfrid Lewis has sufficed to convince me that this appeal ought to be dismissed. In view of the wide terms in which s. 35 of the London County Council (General Powers) Act, 1927, is framed, I am of opinion that it was open to the magistrate to find, not indeed that the particular streets to which the application for a licence related fell within a class of streets within which they clearly did not fall, but that the fact that these streets did not fall within that class was not a sufficient ground for the refusal of the licence. I therefore think that the magistrate was entitled to deal with the case as he did. The magistrate did not say to the appellants, as borough council, that they ought to have ordinarily prescribed the streets in question and had not done so. He did say to them that although the streets had not been ordinarily prescribed, the fact that they had not been so prescribed was not in the circumstances a sufficient ground for their refusal to grant the licence, and that their decision refusing the licence ought not to stand. I think that the view taken by the magistrate was right and should be upheld.

AVORY J. I am of the same opinion. I do not think that we are called upon to accept the invitation, which has been extended to us by counsel for the appellants, to criticize the grounds relied upon by the learned magistrate in support of his judgment. Nor, on the other hand, do I think that we are called upon to say whether any one of these grounds was of itself a matter which he ought to have taken into consideration, more particularly the circumstance that this stall for the sale of ice cream was of great use and advantage to poor children frequenting the adjacent Park between March and September. The question for this Court is, as the magistrate has expressed it at the end of the case stated, whether he came to a correct determination and decision in law in holding that this licence ought to be granted. Sect. 31, sub-s. 2, of the Act of 1927, upon which the question in this case turns, does not say that a licence is not to be granted for use in any street which is not a street ordinarily prescribed by the borough council in licences granted by them pursuant to the Act. If it had said that, the magistrate would not have been entitled to take the view that although these streets were not streets ordinarily prescribed by the borough council still a licence ought to be granted in respect of them, and there would of course have been ample ground for the argument that the magistrate had no right to give the decision which he gave, inasmuch as it was in conflict with the actual terms of an Act of Parliament. The sub-section, however, does not say that, but merely says that it shall be a ground upon which the borough council may refuse to grant or renew a licence that the street to which the application relates is not a street ordinarily prescribed by them. It seems to me that under s. 35, which provides for an appeal from the refusal of the borough council to grant a licence, and more especially under the words of that section "the court may make such order as it thinks fit," it was open to the magistrate, notwithstanding that these particular streets were not streets ordinarily prescribed, to say that the licence should be granted in the present case.

For these reasons I agree that this appeal should be dismissed.

HUMPHREYS J. The arguments of Mr. Wilfrid Lewis as amicus curiae have confirmed me in the opinion which I had formed that the learned magistrate was right in taking the view that he was bound to reject the contention of the appellants set out in the case and put forward in this Court by Mr. Trustram Eve, that the appeal to the magistrate was restricted to an inquiry whether the streets to which the application for the licence related were or were not streets ordinarily prescribed by the borough council in licences granted by them. If that contention were in fact correct, it would follow that in cases such as the present the right of appeal would be perfectly illusory. Though s. 31, sub-s. 2, of the Act of 1927 does not seem to me to limit an appeal from the district council to the ground relied upon by the council, I prefer to base my decision on the language of s. 35, which appears to me to confer the right of appeal to a judicial tribunal in the same terms in which the right of appeal is given by other statutes. It is a matter of common knowledge and entirely beyond doubt in an ordinary case that a right of appeal is a right to a rehearing of the whole matter in dispute, the appellate tribunal not being confined to the particular reasons which have been given by the court below as the ground of their decision. I can find nothing in either of the sections which I have mentioned or elsewhere in the Act to make me think that this right of appeal should be construed differently from the right of appeal in other cases. I therefore agree that the magistrate was entitled to say that the fact that the particular streets in which the respondent desires to trade were streets in which up to the present persons had not been allowed to trade as street traders was not in this particular case in view of all the circumstances that had been brought to his notice a sufficient ground for refusing the licence to the respondent. I therefore agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *Wilfred Townend.*
Solicitor for Home Office: *The Treasury Solicitor.*

J. R.

1933
May 17, 18.

CLEOBURY MORTIMER RURAL DISTRICT COUNCIL *v.* CHILDE.

Rates and Rating—Distress for Rates—Right of Sporting—Letting of Land by written Agreement not under Seal—Right of Sporting reserved, not by Deed—Severance from Occupation of Land—Separate Hereditament—Rateability of Right of Sporting—Liability of Owner—Rating Act, 1874 (37 *&* 38 *Vict. c.* 54), *ss.* 3, 6—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 67.

A farm was let to a tenant under an agreement in writing, not under seal. The agreement contained a clause reserving to the owner the sporting rights over the agricultural land. The owner refused to pay the rates in respect of the sporting rights so reserved. An application for a distress warrant was refused by the justices on the ground that there had been no severance of the sporting rights from the occupation of the land within the meaning of the Rating Act, 1874:—

Held, that a grant of sporting rights over land could be validly made only by a deed under seal, but where the owner of the land, by an agreement in writing, not under seal, let the land, and, by the same document, reserved to himself the sporting rights, there was in fact a severance of the sporting rights from the occupation of the land within the meaning of s. 6 of the Rating Act, 1874, and the owner was rateable in respect of those rights under sub-s. 3 of that section.

CASE stated by justices for the county of Salop.

At a petty sessions holden at the police court, Cleobury Mortimer, in the county of Salop, on September 20, 1932, a complaint preferred by the Rural District Council of Cleobury Mortimer (hereinafter called "the appellants") against Roland Ivo Lacon Childe (hereinafter called "the respondent") under the Distress for Rates Act, 1849, and the Rating and Valuation Act, 1925, calling upon the respondent to show cause why he had not paid, and refused to pay, a certain general rate made on April 6, 1932, amounting to 8*l.*, to which he had been duly rated and assessed, and for which due demand had been made by the Rural District Council of Cleobury Mortimer, was heard and determined. The justices determined that a warrant of distress should not issue.

Upon the hearing of the complaint, the following facts were admitted or proved :—

(*a*) That the appellants were the rating authority for the Rural District of Cleobury Mortimer.

(*b*) That the general rate was duly made on April 6, 1932, and duly published according to law.

(*c*) That a demand note was duly served upon the respondent in respect of the rate set forth in the summons.

(*d*) That the assessment No. 164 referred to on the demand note related to an entry in the valuation list for the time being in force in the parish of Kinlet, in the said rural district, in respect of "Sporting Rights—The Birch."

(*e*) That the respondent was the owner of a certain farm comprising agricultural land known as "The Birch," in the parish of Kinlet, and that at all material times the farm was let by the respondent to a tenant at a rental under an agreement in writing, but not under seal, reserving to the respondent the sporting rights over the agricultural land.

(*f*) That the sporting rights over the agricultural land were in the hands of the respondent.

(*g*) That the agricultural land was exempt from rates under s. 67 of the Local Government Act, 1929.

(*h*) That the respondent had declined and refused to pay the sum of 8*l.*, being the amount demanded from him in respect of the said general rate.

On the part of the respondent it was contended :—

(1.) That the sporting rights were not severed from the occupation of the land, as there was no document under seal which could create a severance in law.

(2.) That, assuming the sporting rights were severed from the occupation of the land, the sporting rights being severed from the land and not let, and the respondent, as owner, receiving rent for the land, under, and by virtue of, s. 6 of the Rating Act, 1874 (1), the sporting rights should not be separately rateable, and that any separate rate in respect thereof was bad in law.

(3.) That in any event the respondent was not the person to be rated.

(4.) That the sporting rights were part of the agricultural land, and under the provisions of s. 67 of the Local Government Act, 1929 (2), were de-rated.

On the part of the appellants it was contended :—

(1.) That upon the facts proved or admitted the sporting rights were severed from the occupation of the land within the meaning of the Rating Act, 1874.

(2.) That sporting rights severed, but not let, constituted separate rateable hereditaments.

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(1) Rating Act, 1874 (37 & 38 Vict. c. 54), s. 6: "(1.) Where any right of fowling or of shooting or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting) is severed from the occupation of the land and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate, as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list or otherwise the fact and amount of such increase. . . . .

"(3.) Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof."

(2) Local Government Act, 1929 (19 Geo. 5, c. 17), s. 67: "(1.) No person shall, in respect of any period beginning on or after the appointed day, be liable to pay rates in respect of any agricultural land or agricultural buildings or be deemed to be in occupation thereof for rating purposes, and notwithstanding anything in the principal Act, or in the Rating and Valuation (Apportionment) Act, 1928, no such land or buildings shall be included in any rate made in respect of a period beginning on or after that date.

"(2.) For the purposes of valuation lists in force at the appointed day, agricultural land and agricultural buildings shall be deemed to have no rateable value, and, notwithstanding anything in the enactments hereinbefore in this section mentioned, no particulars with respect to such land or buildings shall be included in any subsequent valuation list."

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CLEOBURY MORTIMER R. D. C. *v.* CHILDE.

(3.) That by reason of the provisions of the Rating and Valuation Acts, 1925 to 1928, and the Local Government Act, 1929, the machinery for rating such sporting rights contained in s. 6, sub-s. 1, of the Rating Act, 1874, was rendered inoperative, and that it was therefore necessary to refer to s. 6, sub-s. 3, of the Rating Act, 1874, to ascertain the person to be rated in respect of such sporting rights, and that under the sub-section the respondent was the person to be rated in respect thereof.

(4.) That the incorporeal hereditament consisting in sporting rights severed from the occupation of the land, but not let, was excepted from the definition of agricultural land in the Rating and Valuation Acts, 1925 to 1928, and was not entitled thereunder to exemption from rates.

The following cases were cited: *Swayne* v. *Howells* (1); *Towler* v. *Thetford Rural District Council* (2); *Hastings* (*Lord*) v. *Walsingham Revenue Officer*. (3)

The justices came to the determination that in the premises no warrant of distress should issue.

The question upon which the opinion of the Court was desired was whether, upon the above statement of facts, the justices came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

Erskine Simes for the appellants. The justices were wrong in deciding that a distress warrant for rates should not issue. The appeal raises two points: (1.) whether there has been in this case a severance of the sporting rights from the occupation of the land for the purpose of the Rating Act, 1874, and (2.) who, in the altered state of the law introduced by the Rating and Valuation Acts, 1925–1928, and the Local Government Act, 1929, s. 67, is to be rated in respect of sporting rights which are severed from the occupation of the land and are not let? Sect. 3 of the Rating Act, 1874, extended the Poor Rate Acts to "rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land." Sect. 6

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(1) [1927] 1 K. B. 385.

(2) (1929) 94 J. P. 77.

(3) [1930] 2 K. B. 278.

provides the machinery for the valuation and rating of sporting rights when severed and retained and when severed and let. In this case the land—a farm—was let by a written agreement under hand only, not by a deed. By that agreement the rights of sporting over the land were reserved to the owner. That, it is submitted, was sufficient to constitute a severance of the sporting rights from the occupation of the land for the purpose of s. 3 of the Rating Act, 1874, and the owner becomes rateable in respect of those sporting rights by virtue of s. 6. A reservation of the sporting rights to the owner, in a lease or agreement of tenancy, is effective to revest those rights in the owner. In *Reg.* v. *Thurlstone (Inhabitants)* (1)—a case which was decided before the Rating Act, 1874, was passed—a tenant occupied land under a parol agreement of tenancy from year to year, the sporting rights being reserved to the landlord. It was held that the effect of the reservation of the sporting rights in the agreement was to separate those rights from the other beneficial occupation and that the tenant was only liable to be rated in respect of that which he beneficially occupied, that is to say, he was rateable for the land as diminished in value by the reservation of the shooting rights. He was not rateable in respect of the sporting rights. The respondent relied on *Swayne* v. *Howells* (2), but in that case the question was whether a person who had only a licence to fish was the owner of the right of sporting within the meaning of s. 6 of the Rating Act, 1874. It was held that he was not. Lord Hewart C.J., delivering the judgment of the Court, said that the Legislature must be taken to have known when the Act of 1874 was passed that sporting rights were frequently let for the season only, and therefore made special provisions that in the absence of a lease the landlord should be deemed to be the occupier of the sporting rights. The proposition that as there was no grant by deed of the right of fishing there was in law no severance from the occupation of the land is not justified by the judgment of the Court in *Swayne* v. *Howells*. (2)

(1) (1859) 28 L. J. (M. C.) 106.

(2) [1927] 1 K. B. 385.

In *Rogers* v. *St. Germans Union* (1) the owner of a house and land let the same to a tenant, reserving the sporting rights. Mellor J. said that the sporting rights were severed by the lease from the occupation of the land within the meaning of the Rating Act, 1874. Where a grant is made of the sporting rights only, a deed may be necessary to render the grant effective; but in the case of a grant of land, a reservation of the sporting rights in any document capable of vesting the land in the grantee is sufficient to constitute a severance of those rights from the occupation of land. It makes no difference whether the document in question is an indenture of lease under seal or a document not under seal. In *Towler* v. *Thetford Rural District Council* (2) the appellant owned 3000 acres of land. He let 2000 acres to tenant farmers, reserving the sporting rights. The remaining 1000 acres he retained in his own occupation. There was no demise under seal of the sporting rights. It was held that the sporting rights were not separately rateable, because with regard to the 1000 acres there was no severance of the sporting rights. With regard to the 2000 acres, although there had been a severance of the sporting rights, there was no letting such as is required by the Rating Act, 1874. In *Brigstocke* v. *Rayner* (3) a grant of sporting rights by an agreement not under seal was held not to convey those rights. But that was a case of a direct grant of the sporting rights and not a case of the grant of land and a reservation of the sporting rights. In *Hastings (Lord)* v. *Walsingham Revenue Officer* (4) it was held that where sporting rights over agricultural land were severed, but not let, the person exercising those rights was not entitled to the exemption from rates conferred on occupiers of agricultural land by s. 67 of the Local Government Act, 1929. In this case there has been a severance of the sporting rights from the occupation of land, and the respondent, as the owner of the sporting rights, may be rated in respect of those rights by virtue of s. 6, sub-s. 3, of the Act of 1874.

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(1) (1876) 40 J. P. 807, 808.
(2) 94 J. P. 77.
(3) (1876) 40 J. P. 245.
(4) [1930] 2 K. B. 278.

H. A. Tucker for the respondent. Under s. 3 of the Rating Act, 1874, sporting rights were only to be rated when severed from the occupation of land. There can be no such severance except by deed. Whether the severance is sought to be made by grant or by reservation, an instrument under seal is essential in either case to create a severance in law: see *Brigstocke* v. *Rayner*. (1)

[AVORY J. The question there was whether there had been an effective grant of the sporting rights to some other person. That case does not touch the question whether there can be a valid reservation of the sporting rights without a deed.]

If a landlord wishes to sever the sporting rights from the occupation of the land he must do so by a document which is under seal. The contract of tenancy must be under seal. The position is the same whether it is by reservation or by grant. If a severance is to be created it must be done by deed. See *Rogers* v. *St. Germans Union* (2), where Mellor J., referring to the sporting rights, said: "These rights are no doubt reserved only by way of regrant from the lessee, and we must construe them as if granted in a separate deed."

[The Court referred to the last paragraph in the judgment in *Swayne* v. *Howells* (3), where Lord Hewart C.J. said: "It was further contended on behalf of the appellant that there being in this case no grant by deed of the fishing rights there was in law no severance from the occupation of the land. The cases of *Rogers* v. *St. Germans Union* (2) and *Brigstocke* v. *Rayner* (4) appear to support this view."]

The same result followed in the case of a reservation of the sporting rights in a document not under seal: see *Bird* v. *Higginson*. (5)

[HUMPHREYS J. The decision there was that the grant of an incorporeal hereditament must be under seal. No one doubts that the direct grant of an incorporeal hereditament must be under seal.]

(1) 40 J. P. 245, 247.
(2) 40 J. P. 807, 808.
(3) [1927] 1 K. B. 385, 393.
(4) 40 J. P. 245.
(5) (1835) 2 A. & E. 696; affirmed in Ex. Ch. (1837) 6 A. & E. 824.

A reservation must be treated in the same way as a direct grant. Both separate the interests. If there has been a severance in this case then the sporting rights have not been let and the owner is not liable to be rated in respect of them. In *Hastings (Lord)* v. *Walsingham Revenue Officer* (1) the appellant sought to have the sporting rights entered in the special list so as to be derated as well as the land. The present case is different. In this case the owner of the land is not the proper person to be rated in respect of the sporting rights. Sect. 6, sub-s. 1, of the Rating Act, 1874, provides that the occupier and not the owner is the proper person to be rated in the first place where the rights are severed and not let. Sect. 6, sub-s. 1, of the Rating Act, 1874, has never been repealed.

[LORD HEWART C.J. It was stated in *Hastings (Lord)* v. *Walsingham Revenue Officer* (2) that it might well be "that in certain cases some of the machinery comprised in s. 6 of the Act of 1874 is not indeed expressly repealed, but in effect rendered obsolete."]

The sporting rights are a separate rateable hereditament only when let. Para. (1) of s. 3 and ss. 4 and 5 of the Rating Act, 1874, are expressly repealed by the Local Government Act, 1929, Sch. XII., Part V., as respects agricultural land. If the Legislature had intended to repeal s. 6, sub-s. 1, they would have said so. But there is no express repeal of that sub-section. By s. 67, sub-s. 1, of the Local Government Act, 1929, no particulars with respect to agricultural land or buildings are to be entered in the valuation list. Therefore no entries in respect of sporting rights over agricultural land can be made, because they are rights and particulars with respect to agricultural land. In this case there has been no severance, but if there has been a severance, the machinery of s. 6, sub-s. 1, of the Act of 1874 must be followed, and it is the occupier and not the owner who should be rated.

Simes replied.

LORD HEWART C.J. This is a case stated by justices for the county of Shropshire. It arises in the following way:

(1) [1930] 2 K. B. 278. (2) [1930] 2 K. B. 278, 288, 289.

At a petty sessions holden at Cleobury Mortimer on September 20, 1932, a complaint preferred by the Rural District Council, the appellants, against Roland Ivo Lacon Childe, the respondent, under the Distress for Rates Act, 1849, and the Rating and Valuation Act, 1925, calling upon the respondent to show cause why he had not paid, and refused to pay, a certain general rate—namely, the general rate made on April 6, 1932, amounting to 8*l.*, to which he had been duly rated and assessed, and for which due demand had been made by the district council, was heard and determined, and upon that hearing the justices determined that a warrant of distress should not issue. The question for us is whether they came to a correct determination in point of law.

The case raises a difficult question with regard to the rating of sporting rights. On the part of the appellants it was contended "that sporting rights severed, but not let, constituted separate rateable hereditaments"; "that by reason of the provisions of the Rating and Valuation Acts, 1925 to 1928, and the Local Government Act, 1929, the machinery for rating such sporting rights contained in s. 6, sub-s. 1, of the Rating Act, 1874, was rendered inoperative; and that it was, therefore, necessary to refer to s. 6, sub-s. 3, of the Rating Act, 1874, to ascertain the person to be rated in respect of such sporting rights, and that under the sub-section the respondent"—that is, the owner—"was the person to be rated in respect thereof." Finally, it was contended "that the incorporeal hereditament consisting in sporting rights severed from the occupation of the land but not let is excepted from the definition of agricultural land in the Rating and Valuation Acts, 1925 to 1928, and is not entitled thereunder to exemption from rates." I have come to the conclusion that the contentions of the appellants are correct; and I come to that conclusion especially upon s. 3, para. 2, of the Rating Act, 1874, which refers "to rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land"; and s. 6, sub-s. 3: "Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof." The main questions, I think, were determined by this Court in the comparatively recent case of *Hastings* (*Lord*) v. *Walsingham Revenue Officer.* (1) This is not a case in which the sporting rights were let to some third person. The sporting rights were reserved by the landlord himself. I think, therefore, that the contention of the appellants is correct, and that this appeal ought to be allowed.

AVORY J. I have come to the same conclusion. The question raised in this case is complicated by the provisions of the Rating and Valuation Acts, 1925 to 1928, and particularly by the provisions of the Local Government Act, 1929, which provides in s. 67 that: "No person shall, in respect of any period beginning on or after the appointed day"—which was October 29—"be liable to pay rates in respect of any agricultural land or agricultural buildings, or be deemed to be in occupation thereof for rating purposes, and notwithstanding anything in the principal Act, or in the Rating and Valuation (Apportionment) Act, 1928, no such land or buildings shall be included in any rate made in respect of a period beginning on or after that date." Further: "For the purposes of valuation lists in force at the appointed day, agricultural land and agricultural buildings shall be deemed to have no rateable value, and, notwithstanding anything in the enactments hereinbefore in this section mentioned, no particulars with respect to such land or buildings shall be included in any subsequent valuation list." If this present case fell to be decided only under the Rating Act, 1874, there would be no question that the case came within s. 6, sub-s. 1, of that Act, which provides that "where any right of fowling, or of shooting, &c." (hereinafter referred to as a right of sporting), is "severed from the occupation of the land and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate, as is paid by him in respect of such increase."

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(1) [1930] 2 K. B. 278.

The first question to be determined under that Act of 1874 would be whether in fact the right of sporting in the present case was severed from the occupation of the land. There is no question that it was not let. If it appears that the right of sporting was severed from the occupation of the land, then, as I have said, the case would have clearly come within s. 6, sub-s. 1, of the Act of 1874.

Upon the question whether the right of sporting in this case was severed from the occupation of the land, we have had authorities cited to us which undoubtedly show that a grant of sporting rights over land can be validly made only by deed under seal. It has been contended in this case for the respondent that there was no severance, because there was no grant of any sporting right under seal. But the question whether there was a grant of a sporting right does not arise in this case, because what in fact happened was that the present respondent granted or let the land over which the sporting right was exercised, reserving to himself the right of sporting. I think that Mr. Simes was right in saying that those decisions have no application to a case like the present, where the owner of the land has let the land and reserved to himself the right of sporting; and that there was in fact a severance in this case within the meaning of s. 6.

The only authority which seems directly to touch this point is the case of *Reg.* v. *Thurlstone* (*Inhabitants*), where Wightman J. said (1): "The tenant is only liable to be rated to that which he at present beneficially occupies, and the effect of the reservation in the agreement"—that was a reservation of the right of sporting—"coupled with the Act 1 and 2 Will. IV., 32, is to separate the right to the game and shooting from the other beneficial occupation." But when the conclusion is reached that, under the Act of 1874, the case would have fallen within s. 6, sub-s. 1, it is clear that, by the effect of the Local Government Act of 1929, it is impossible to apply the provisions of that subsection to the present case, because, the Act of 1929 having said that agricultural land shall be deemed to have no rateable value, it is quite impossible to say that the rateable value is increased by reason of the sporting right having been severed and not let. But while that is the result of the Act of 1929, no one has ever suggested that the subsequent legislation has repealed, either expressly or impliedly, the provisions of s. 3, sub-s. 2, of the Act of 1874, which made this right of sporting a rateable hereditament. If it remains a rateable hereditament it is clear that somebody must be liable to be rated for it. The respondent contended first of all that the sporting rights were not severed from the occupation of the land, inasmuch as there was no document under seal which could create a severance in law. I have already dealt with that point.

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(1) 28 L. J. (M. C.) 106, 109.

Next he contended "that assuming that the sporting rights were severed from the occupation of the land, the sporting rights being severed from the land and not let, and the respondent as owner receiving rent for the land under and by virtue of s. 6 of the Rating Act of 1874, the sporting rights should not be separately valued, and were not separately rateable, and that any separate rate in respect thereof was bad in law." That, again, I have dealt with in pointing out that it is impossible to apply, in the present state of legislation, the provisions of s. 6, sub-s. 1. Then he further contends: "That in any event the respondent was not the person to be rated." As somebody must be the person to be rated—there is clearly nobody else who can be—and sub-s. 3 of s. 6 provides: "Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof"; and sub-s. 4 further provides: "For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right . . . . shall be deemed to be the owner of the right," therefore it is clear, under sub-ss. 3 and 4 of s. 6, that he is the person who is to be rated as the occupier of the sporting right, and is also to be deemed the owner.

Finally, the last contention of the respondent was "That the sporting rights were part of the agricultural land, and under the provisions of s. 67"—to which I have already called attention—"of the Local Government Act, 1929, were de-rated." That point has been expressly dealt with by this Court in the case of *Hastings* (*Lord*) v. *Walsingham Revenue Officer* (1), the headnote of which summarizes the judgment in these words: "Where sporting rights over agricultural land are severed but not let the person exercising those rights is not entitled to the exemption from rates conferred on the occupiers of agricultural land by the Agricultural Rates Act, 1929." For these reasons I agree that this appeal should be allowed, and that the distress warrant should issue.

HUMPHREYS J. I am of the same opinion; and I should be content to state so without adding anything of my own since the judgment of my brother Avory has really covered the whole of the ground, but for the fact that the first point raised by Mr. Tucker is a point of substance on which there appears to be no direct authority. Mr. Tucker says that the effort which was made in this case by the owner of both the land and the sporting rights to sever the sporting rights from the occupation of the land, which effort was made by an agreement in writing, but not under seal, failed for the reason that the document in question was not under seal; and many cases have been quoted to us in which the Courts have held that an attempt to sever sporting rights from the occupation of land has failed on that ground. Why? The reason in each case appears to me to be this: that sporting rights being an incorporeal hereditament cannot be successfully conveyed except by deed. However, in this case no attempt has been made to convey that incorporeal hereditament at all. What has been done has been to bring into existence an instrument which admittedly is a perfectly good instrument for the purpose of letting the land. In that instrument there is a reservation of the rights of the owner over the sporting. In other words, no interference is created with the existing position as to the rights of sporting. All that is done is to grant a tenancy of the land. Therefore, the reasons which underlie these various decisions appear to me not to apply at all to this case. But I further think that, although there is no direct authority, the case which my brother Avory has referred to of *Reg.* v. *Thurlstone* (*Inhabitants*) (1) is to some extent in accordance with the view which I have expressed. It is true, as was pointed out by my brother Avory in the course of the argument, that that case is a little complicated by the fact that reference was made in it to the Game Act, which is still extant and of full force and effect. I cannot help thinking that if the grant in that case, which was a grant by parol only, reserving to the owner the sporting rights, had been, as according to the argument of Mr. Tucker it must have been, a perfectly nugatory agreement, some indication of that would have been found in the judgments of the three judges, who gave separate judgments in that case. So far from that being so, each of them, in different language, expressed the view that that parol agreement was a perfectly effective agreement for the purpose of transferring the right to the occupation of the land on the one hand and reserving to the grantor the sporting rights on the other. The words of Wightman J. are (2): "The tenant is only liable to be rated to that which he at present beneficially occupies, and the effect of the reservation in the agreement"—which, as I have stated, is a parol agreement—"is to separate the right to the game and shooting from the other beneficial occupation." Hill J. observes as follows (3): "The true question is, what is the hereditament of which

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(1) [1930] 2 K. B. 278.

(1) 28 L. J. (M. C.) 106.
(2) Ibid. 109.
(3) Ibid. 110.

the person rated "—that is, the tenant—" was the occupier? Was the right of shooting separated from the land? The present tenant took the land as distinctly separated from the right of shooting, as if Lord Scarborough had himself previously granted the right of shooting to some third person." That case does appear to me to be an authority, at least, to some extent, for the proposition which was contended for here on behalf of the appellants. I think that the result of the agreement which was entered into in this case was to sever the right of sporting from the occupation of the land.

The second point appears to me one of very little substance at all. It is a mere matter of machinery: but it does raise a question which was designedly left open by my Lord in his judgment in the case of *Hastings* (*Lord*) v. *Walsingham Revenue Officer* (1), when my Lord observed: "I refrain from the task which has been indicated to the Court of settling the form of valuation list which is suitable to the new circumstances "—that being a case in which the Court held that where sporting rights over agricultural land are severed but not let, the person exercising those rights was not entitled to exemption from rates conferred on the occupier of agricultural land by the Agricultural Rates Act. The position that arises seems to be this. Mr. Tucker contends, and rightly, that prima facie he is entitled to call in aid sub-s. 1 of s. 6 of the Rating Act of 1874, which provides that where sporting rights—I am leaving out some unnecessary words—are severed from the occupation of the land and are not let, then the person who has to pay rates in the first instance in respect of those sporting rights is the tenant. He is not to be rated separately in respect of those sporting rights; but the value of the land which he occupies, and in respect of which he is rated, is to be enhanced by the proper amount, as a result of those sporting rights which attach to it. He is to pay an enhanced value; and then he is to be able to get back from the owner, who has reserved to himself the rights of sporting, that extra amount by way of deduction from the rent.

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(1) [1930] 2 K. B. 278, 290.

In this case, however, the thing is complicated by the Acts, which are shortly known as the Derating Acts, one of which is the Local Government Act, 1929, which by s. 67 provides in effect that this tenant who has taken this land is not to be rated at all in respect of that land; and no particulars with respect to that holding of his are to be entered in the valuation list at all. Therefore, unless some new entry is to be made in the valuation list in respect of these sporting rights which he has not got and which expressly, by the terms of the agreement under which he holds the land, he is not to have, then the valuation list will be silent with regard to this matter. I desire to guard myself against being supposed to say that if the valuation list had included the name of this tenant and a reference to the land which he occupied, and had rated that tenant in respect of the sporting rights, that would have been illegal, so that this Court could have upset that valuation list. I reserve that question, because s. 6, sub-s. 1, still remains, and in terms applies to the facts of this case. But common sense points out that if it is possible to achieve the same result in a simpler way, that other method clearly ought to be adopted. That which is contended for by Mr. Tucker is obviously a roundabout, expensive, and most ineffective way of arriving at that which everybody agrees is to be the ultimate result—namely, that the owner is to be at the expense of paying these rates in respect of the sporting rights which are his, and which he has reserved to himself. Although I have some little doubt about the matter, I agree with the other members of the Court on the whole that sub-s. 3 of s. 6 is brought into operation as a result of this complicated legislation; legislation which, of course, was never contemplated when the Rating Act, 1874, was passed; and that it may be said that this is a case in which the owner of the right of sporting which is severed from the occupation of the land may be rated as the occupier thereof. That course being taken, as I have said, exactly the same result is arrived at as would be arrived at by the much more cumbrous method suggested by Mr. Tucker. It seems to me to do justice in the case. On the whole, I think that there is no legal objection to our reading the section in that way, and saying that the words " Subject to the foregoing provisions," which are to be found at the commencement of sub-s. 3, may be satisfied where one gets a case in which, as a result of the subsequent legislation, sub-s. 1 of s. 6 is for practical purposes inoperative and unworkable.

For these reasons, I agree that the appellants in this case succeed.

Appeal allowed.

Solicitor for the appellants: *J. J. McIntyre, for J. H. Thursfield, Kidderminster.*

Solicitors for the respondent: *Marcy, Hemingway & Sons, Bewdley.*

T. W. M.

1933
May 18.

COVENTRY CORPORATION *v.* SURREY COUNTY COUNCIL.

Poor Law (Settlement)—Child—Illegitimate Child under Sixteen—Adopted Child—Adopting Father—Irremovability—Adoption of Children Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 29), *s.* 5—*Poor Law Act*, 1930 (20 *Geo.* 5, *c.* 17), *ss.* 85, 86, 93.

The combined effect of the Adoption of Children Act, 1926, and the Poor Law Act, 1930, is to place the adopting father of a poor person in the position of the lawful father. Thus, in the Poor Law Act, 1930, s. 93, sub-s. 4, the word " father " must be construed as including an " adopting father."

An adopting father was settled in and was irremovable from the city of L. His adopted child, a poor person under the age of sixteen, had resided for three years with him in that city:—

Held, that the child had acquired a settlement of his own in the city of L. by virtue of the Poor Law Act, 1930, s. 86, sub-s. 1, and was himself irremovable therefrom by virtue of s. 93, sub-s. 4.

CASE stated for the opinion of the Court pursuant to the Quarter Sessions Act, 1849, s. 11.

On September 15, 1932, upon complaint by the respondents, an order was made by justices of the peace for the county of Surrey that Wilfred Wilton Hall, a poor person, be removed to the city and county borough of Coventry.

The appellants gave notice of appeal against the order to the Court of Quarter Sessions for the county of Surrey. By consent of the parties and by order of Talbot J., dated February 2, 1933, a special case was stated between the appellants and respondents, the parties agreeing that judgment in conformity with the decision of the High Court be entered at Quarter Sessions in accordance with the Quarter Sessions Act, 1849.

The case stated was as follows:—

Wilfred Wilton Hall (hereinafter called "the poor person") was born on July 16, 1916, at Ashby-de-la-Zouch in the county of Leicester, and is the illegitimate child of Lucy Hall. The said Lucy Hall has since the year 1925 continued to be and still is irremovable from and last settled in the city and county borough of Coventry. The poor person has not resided with the said Lucy Hall since the month of August, 1916. From the month of August, 1916, to the month of February, 1927, the poor person resided with a foster mother in the city and county borough of Leicester. From the month of February, 1927, until October 29, 1931, the poor person resided continuously and without interruption at 33 Arundel Street in the city and county borough of Leicester with Charles Herbert Wall and his wife Martha Ann Wall (hereinafter together called "the adopters").

On November 25, 1927, an order was made by Ida Warner, a justice of the peace for the city of Leicester, pursuant to the Adoption of Children Act, 1926, authorizing the adopters jointly to adopt the poor person.

From a date prior to November 25, 1927, the adopters have continued to be and still are irremovable from, and last settled in, the city and county borough of Leicester.

From October 29, 1931, until July 26, 1932, the poor person was an inmate of the Gordon Boys' Home at Woking in the county of Surrey. On July 26, 1932, the poor person became chargeable to the county of Surrey. On September 15, 1932, two of His Majesty's justices of the peace acting in and for the county of Surrey ordered the poor person to be removed to the city and county borough of Coventry.

On October 27, 1932, within the time prescribed by the Poor Law Act, 1930, s. 97, sub-s. 1, the appellants duly gave notice of appeal against the said order of removal to the Court of Quarter Sessions holden in and for the county of Surrey, and on November 17, 1932, within the time prescribed by s. 97, sub-s. 2, of the Poor Law Act, 1930, the appellants duly served upon the respondents a statement of the grounds of appeal.

The appellants contend: That since November 25, 1927, the poor person has for the purposes of the Poor Law Act, 1930, stood to the adopters in the same relation as a child would have stood to a lawful father and mother respectively; that, while residing with the adopters in the city and county borough of Leicester between November 25, 1927, and October 29, 1931, the poor person was, by reason of s. 93, sub-s. 4, of the Poor Law Act, 1930, irremovable therefrom and acquired a settlement therein by virtue of s. 86, sub-s. 1, of the Poor Law Act, 1930 (1), and still retains that settlement; alternatively, that by virtue of s. 85, sub-s. 1, of the Poor Law Act, 1930, the poor person has derived from the said Charles Herbert Wall a settlement in the city and county borough of Leicester and still retains that settlement; that the poor person is not last settled in the city and county borough of Coventry.

(1) The Poor Law Act, 1930 (20 Geo. 5, c. 17), provides:—

Sect. 85, sub-s. 1: "Until a person acquires a settlement of his own or derives a settlement from a husband, that person—

(*a*) . . . .

(*b*) If an illegitimate child, shall take and follow, up to the age of sixteen, the settlement of his mother;

and shall in either case retain the settlement which, under the foregoing provisions of this section, he had at the age of sixteen."

Sect. 86, sub-s. 1: "Where a person has resided for the term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained in this Act, render him irremovable, he shall be deemed to be settled in that county or county borough."

Sect. 93, sub-s. 4: "No child under the age of sixteen residing in a county or county borough with his father, mother, stepfather, stepmother or reputed father shall be removed, nor shall any order be made for the removal of the child, from the county or county borough in any case where the father, mother, stepfather, stepmother or reputed father may not lawfully be removed therefrom."

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The respondents contend: That the order referred to above should be disregarded for the purposes of the Poor Law Act, 1930; that while residing with the adopters in the city and county borough of Leicester between November 25, 1927, and October 29, 1931, the poor person was not by reason of s. 93, sub-s. 4, of the Poor Law Act, 1930 (1), irremovable therefrom and did not acquire a settlement therein by virtue of s. 86, sub-s. 1, of the said Act; that by virtue of s. 85, sub-s. 1, of the Poor Law Act, 1930 (1), the poor person has derived from the said Lucy Hall a settlement in the city and county borough of Coventry and still retains that settlement; that the poor person is last settled in the city and county borough of Coventry.

The question for the opinion of this Court is whether or not the poor person is last settled in the city and county borough of Coventry.

S. G. Turner K.C. and *H. W. Wightwick* for the appellants. Until the poor person acquired a settlement of his own, being illegitimate, he took the settlement of his mother: Poor Law Act, 1930, s. 85, sub-s. 1. But by residing with his adopting parents in Leicester from 1927 to 1931 he acquired a settlement of his own by s. 86, sub-s. 1. Under the Adoption of Children Act, 1926, s. 5, all rights, duties, obligations and liabilities of the parents vest in the adopters. By the Poor Law Act, 1930, s. 86, sub-s. 1, a person who has resided for three years in a county or county borough in such circumstances as would render him "irremovable" is deemed to be settled there. By s. 93, sub-s. 4, of the same Act, "No child under the age of sixteen residing in a county or county borough with his father, mother, stepfather, stepmother or reputed father shall be removed, nor shall any order be made for the removal . . . . in any case where the father" may not lawfully be removed. Since the Adoption of Children Act, 1926, "father" in s. 93, sub-s. 4, must include "adopting father." The poor person here has become the legitimate child of his adopting parents by virtue

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(1) See note (1) ante, p. 386.

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of the Adoption of Children Act, 1926, and retains the settlement in Leicester as his own.

The effect of the Adoption of Children Act, 1926, s. 1, is to extinguish the rights of the natural parents and to vest them in the adopters. This includes rights of custody and maintenance. [He referred to s. 52, sub-s. 7, of the Poor Law Act, 1930, as to the duties of county councils in the case of adopted children.] The object of the Poor Law Act, 1930, s. 85, sub-s. 1, which enables a poor person to acquire a derivative settlement, and also of s. 93, sub-s. 4, was to avoid the breaking up of the home. In *Guardians of Fulham Parish* v. *Guardians of Woolwich Union* (1), Lord Loreburn, referring to s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, said that by that section all persons whether legitimate or not who had a status of irremovability were also endowed with a settlement. By s. 3 of the Poor Removal Act, 1846, an illegitimate child living with its reputed father cannot be removed when the father is irremovable. The purpose of the section was "to prohibit the breaking up of homes." The Poor Law Act, 1930, s. 85, sub-s. 1, corresponds to the Divided Parishes and Poor Law Amendment Act, 1876, s. 35, and s. 86 corresponds to the Act of 1876, s. 34. Here the poor person has acquired a settlement of his own at Leicester by the combined effect of the two statutes, and the place of settlement is not Coventry, as found in the order of the justices.

Montgomery K.C. and *W. B. Manley* for the respondents. The Adoption of Children Act, 1926, did not alter rights in which the public are concerned, relating to irremovability and settlement. It only affected rights and liabilities as between the natural and adopting parents.

[LORD HEWART C.J. The Adoption of Children Act, 1926, s. 5, sub-s. 1 (proviso), bestows the necessary jurisdiction upon any Court to make orders as to custody and maintenance of the adopted child.]

That proviso is only directed to special circumstances when there are two adopting parents. The relationship is

(1) [1907] A. C. 255, 259.

new and is not dealt with in s. 93, sub-s. 4, of the Poor Law Act, 1930. That is a consolidating statute, and the words "father" and "mother" bear the same meaning as in the older statutes.

Turner K.C. in reply. The duty of the local authority as to the relief of poor persons is shown in the Poor Law Act, 1930, s. 15. The duty of maintenance referred to in the Adoption of Children Act, 1926, s. 5, sub-s. 1, relates to the reciprocal duty of maintenance mentioned in the Poor Law Act, 1930, ss. 15, 18 and 20. The question of removal is inseparable from that of custody, and is a right relating to the future custody of the child.

LORD HEWART C.J. In my opinion this appeal ought to succeed, and for the reasons given by Mr. Turner. It seems to me that the combined effect of the Adoption of Children Act, 1926, and the Poor Law Act, 1930, is for this purpose to put the father, who is the adopter, in the same position as that of the natural father. The order made by the justices must be quashed, and judgment entered at Quarter Sessions for the appellants.

AVORY J. I am of the same opinion. If the case depended solely upon the effect of s. 5 of the Adoption of Children Act, 1926, there might be some doubt whether the words extend to an order made by a local authority for the relief or the removal of a pauper, although in my opinion the proviso to s. 5, sub-s. 1, which happens to fit this particular case, appears to cover the case of an order made by any Court as to the "custody and maintenance" of a child. It provides that in such case "for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children," the adopters are to be regarded "in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother respectively." But apart from that, I think that s. 93, sub-s. 4, of the Poor Law Act, 1930,

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must be read as including in the words "father, stepfather, or reputed father," the adopting father, and reading it in that light there is a provision that "No child under the age of sixteen residing in a county or county borough with his father"—which I read as including an "adopting father"—"shall be removed, nor shall any order be made for the removal of the child, from the county or county borough in any case where the father . . . . may not lawfully be removed therefrom." It is admitted in this case that this child had resided for three years and more in the borough of Leicester, and that the adopting father, whom I take to be the "father" for the purpose of this section, was not lawfully removable from that borough. In those circumstances, by virtue of the provisions of s. 86, this child has acquired a settlement by residence in the borough of Leicester, and was not removable therefrom. The order removing him in this case to Coventry, which was made under s. 85 on the ground that he was an illegitimate child and took the settlement of his mother, was in my opinion wrongly made, and must be quashed.

HUMPHREYS J. I agree that s. 93, sub-s. 4, of the Poor Law Act, 1930, uses the word "father" in the widest possible sense. Therefore, when one finds that not only "father" or "mother," but even a reputed father, which I understand to mean a putative father of an illegitimate child, is referred to in the section, it seems to me that the Legislature, knowing as it must have done in 1930 that there was a species of father and mother in existence called "the adopters," must be taken to have included them in those very wide words. The result is that when the two Acts are read together, the adopters, under the Adoption of Children Act, 1926, become the fathers and mothers of the children for the purpose of the Poor Law Act, 1930.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Vernon Younger, Coventry.*

Solicitors for respondents: *Wyatt & Co., for Dudley Aukland, Kingston-upon-Thames.*

F. P. F.

In re THE RAILWAYS ACT, 1921.

In re AN APPLICATION BY THE GREAT WESTERN RAILWAY COMPANY.

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May 18, 19, 31.

Railway—Rates—Standard Rate—New exceptional Rate—Sanction sought for "flat rate" irrespective of Distance carried—Exceptional Rate Counterpart of standard Rate—A Charge based on so much per Ton per Mile—Railways Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 55), *ss.* 37, 40.

An exceptional rate, within the Railways Act, 1921, is a miniature counterpart of the standard rate where the same services are being rendered by the railways, and it must contain a charge for conveyance based on so much per ton per mile according to distance and class of merchandise carried. A railway company is therefore not entitled to grant to one of its customers a flat rate of so much per ton irrespective of the distance the merchandise is carried.

APPEAL from a decision of the Railway Rates Tribunal.

By an agreement made in October, 1931, between the Great Western Railway Company and Messrs. Unilever, Ld., and Messrs. J. Robinson & Co., Ld., who were merchants and millers at Bristol, and were an associated company of Unilever, Ld., in consideration of Messrs. Robinson (who previously had sent part of their goods, 12,000 tons, by road, and were thinking of extending their road transport) agreeing to send all their goods by rail, the Great Western Railway Company granted tham a "flat rate" of 7*s.* 2*d.* per ton from Avonmouth to every station within the area mentioned in the application independently of the distance the merchandise was carried.

The traffic was described in the application as "Oilcake and meals and husks for animal feeding in Class 8 of General Classification of merchandise forwarded from Avonmouth Docks on account of Messrs. J. Robinson & Co., Ld."

There were 320 goods stations within the area to which the "flat rate" of 7*s.* 2*d.* applied. The Great Western Railway Company had been charging Messrs. Robinson's traffic to the above mentioned 320 stations at the above flat rate of 7*s.* 2*d.* per ton since December, 1931.

In September, 1932, the Great Western Railway Company applied to the Railway Rates Tribunal for the sanction of that Court to the rate of 7*s.* 2*d.* to some 208 stations in the defined area where the rate of 7*s.* 2*d.* was either within 5 per cent. or more than 40 per cent. below the standard rate chargeable, as was required by s. 37, sub-s. 1, of the Railways Act, 1921, although the distance to those stations varied from seventeen miles to 106 miles, and the standard rate which would be paid, in the absence of an exceptional rate, varied from 7*s.* 3*d.* to 24*s.* 11*d.* No notice of the new exceptional rates was reported to the Minister of Transport within fourteen days.

The application was opposed by various associations of traders within the specified area.

The circumstances under which the Great Western Railway granted the "flat rate" of 7*s.* 2*d.* per ton to Messrs. J. Robinson & Co., Ld., are set out in the judgment of the Railway Rates Tribunal.

The hearing before the Railway Rates Tribunal took place on October 18, 19, 20, 24, 1932.

The President of the Tribunal, Sir Walter Clode K.C., on November 24, 1932, delivered the following judgment refusing the consent of the Tribunal to the application.

This is the unanimous judgment of the Court.

Messrs. Robinson & Co., Ld., who are controlled by Messrs. Unilever, Ld., are millers at Avonmouth, where they manufacture (inter alia) oil cake and meal for cattle feeding. In June, 1931, having a considerable business in these commodities for delivery from their mill to destinations within a wide area and then being carried as to part by road in their own vehicles, and as to part by rail, they invited the Great Western Railway to make an offer for the carriage of so much of this traffic railborne and roadborne as was destined for places within a part of their delivery area which they indicated. There is no evidence as to what this part was or as to the amount of traffic passing to it. Robinsons told them that only an "all in" or "flat rate" would be considered, that they were thinking of replacing their own fleet of lorries with more powerful ones which would have a wider area of competition with the railways interested, the

Great Western, the London Midland & Scottish, the Southern and the Somerset and Dorset Joint, and that they were thinking of calling in road hauliers also to tender. The Great Western Railway made certain tests and quoted a flat rate of 7*s.* 2*d.* per ton for the above area. Robinsons rejected this and talked of a flat rate of about 2*s.* less. This in its turn was unacceptable to the railways, who agreed to go into the matter again upon the basis of a larger area—namely, the one shown on the map and coloured pink, suggested by Messrs. Robinson. The calculation which the Great Western Railway Company then made was as follows. There were and are 320 goods stations in the "pink" area. They made an examination of the whole of the traffic in oil cake and feeding stuffs which had been forwarded on account of Messrs. Robinson by railway for the twelve months ending June 30, 1931, they then charged it at the rates it had borne, and found that the weighted average rate per ton for the whole of that traffic was 7*s.* 11.52*d.* They then took steps to ascertain the corresponding figure for the like traffic which had passed during the same twelve months by road in Messrs. Robinson's vehicles. They were not given the actual amount of this traffic by Messrs. Robinson, but they were given details of the traffic which had passed in July, 1930 (a light month), and in January, 1931 (a heavy month), from Messrs. Robinson to any farms, mills, places or stations in the pink area. They then multiplied the total of these two months by six and treated the result as the total traffic for the year 1930–1931. The deliveries of the two months they allocated to the various stations in the pink area to which when railborne they would have been carried, charged each item of it with the applicable railway rates, and then proceeded in the same way as they had done in the case of the railborne traffic to ascertain the weighted average. This they brought out at 7*s.* 1*d.* They then combined the two figures, the 7*s.* 11.52*d.* (railborne) and 7*s.* 1*d.* (roadborne), and got a figure of 7*s.* 7.74*d.*

The approximate amount of such traffic to places within the pink area for the year ending June 30, 1931, was railborne 21,600 tons, roadborne 12,000 tons.

There has been no serious criticism of these calculations, but it has been stated with truth that the figures on which they are founded are not "constants," and that if, as is likely, the volume of the trade varies up or down or its destinations amongst the 320 stations change compared with the basic year 1930–31 the averaged "rates" derived from them would change too and become unreliable. It is answered that if this happens the necessary correction could be made as regards future carryings.

With this figure of 7*s.* 7.74*d.* the railway company renewed negotiations; and ultimately they conceded a rate of 7*s.* 2*d.* The figure of 7*s.* 7.74*d.* applied to the traffic estimated and known produced a sum of the same amount as Messrs. Robinson's traffic known and estimated for 1931 would have yielded if charged at the existing rates. They thought if they could hold the 21,600 tons of traffic which they had already on rail and acquired 12,000 tons more as well as a promise that Messrs. Robinson would continue to hand to the railway company the traffic which had previously been railborne to places outside the pink area they would be justified in making a concession, and they made it by promising a charge of 7*s.* 2*d.* Messrs. Unilever desired them to show that if they got the contract they would be able to handle the business efficiently. An "experimental" working for a month was made during October, 1931, Robinsons handing over the whole business to the railway company, who dealt with it to their satisfaction, charging it at the rates standing in the company's rate books.

The bargain is evidenced by three letters dated respectively October 26, October 28, and October 29, 1931.

Since December, 1931, the railways interested have been charging Messrs. Robinson's traffic to the above mentioned 320 stations at the above "flat rate" of 7*s.* 2*d.* ascertained as above under the above contract.

This flat rate charge of 7*s.* 2*d.* to 208 of the above stations has been submitted to us for our consent under the provisions of sub-s. 1 of s. 37 of the Railways Act, 1921, in Great Western Schedule No. 953 included in Application, 1932, No. 13.

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We have given the matter the best consideration that we can and have come to the conclusion that we are unable to give our consent to the charges which have been submitted to us, firstly, because, in our opinion, they are not new exceptional rates within the meaning of the Act, and secondly, because if they are, we have no evidence that the company, if our consent was given, would be better off and, therefore, nearer to standard revenue than if it were withheld.

The principle at the back of our decision is that a statutory undertaking such as a railway company must be conducted on the terms upon which its powers were granted, and if what is proposed to be done is not within those powers the proposal fails. The necessity for adhering to this rule in the present case is apparent when we recall that the Railways Act, 1921, which we are administering, embodies an intricate method of rate regulation which can only be realized by a due application by the companies of their authorized statutory charges to the traffics which they carry. Briefly the railway companies are here proposing to charge for the carriage of merchandise by merchandise train what may be called an "averaged" rate whereas by the terms of their undertaking they can only make for such service of carriage separate charges for each consignment at the rate of so much per ton per mile for conveyance according to the distance which the railway companies carry the consignment and the class of the traffic carried plus terminals. We think that this is the only conclusion to be drawn from a consideration of the provisions of the Railways Act, 1921.

For the carriage of merchandise there are under that Act only two charges which a company is entitled to make, a "standard charge" or an "exceptional rate" and both include a conveyance rate as above. By s. 30 of the Act of 1921 the companies in submitting their Schedules of proposed standard charges for consideration and settlement by the Tribunal were required to show in the Schedules (inter alia) the "rates for the conveyance of merchandise" and if Part I. of the Fourth Schedule be referred to it will be seen how it had to be done and was submitted. It was settled in this form, and in this form the Schedules were enacted, and the "conveyance rate" thus incorporated. The "standard charge" is the foundational charge on which the whole system rests.

Following upon this, s. 32 enacts that "on and from the appointed day the charges appearing in the schedule of charges as fixed by the rates tribunal for each amalgamated company (in this Part of this Act referred to as 'the standard charges') shall be the charges which that company shall be entitled to make for all services rendered in respect of which charges are fixed, and no variation either upwards or downwards shall be made from such authorised charges unless by way of an exceptional rate or an exceptional fare continued, granted, or fixed under the provisions of this Part of this Act, or in respect of competitive traffic in accordance therewith." In this way the Act substituted for the old "maximum charges" which "might" be charged, "standard charges" which "must" be charged: an obligation which the system of rate regulation embodied in the Act rendered necessary, and included in this obligation the duty of charging for conveyance by conveyance rates fixed at such an amount and upon such principles as the Act prescribed.

It will be noted however that the section contains an exception to the obligation to charge standard rates in favour of "exceptional" rates; and if we turn to s. 57 we see what an exceptional rate is. It is included in the definition of "exceptional charges." "The expression 'exceptional charges' means charges below the standard charges, including special charges continued subject to adjustment under the provisions of this Part of this Act, and the expressions 'exceptional rates' and 'exceptional fares' shall be construed accordingly."

We are dealing with the "special charges" above mentioned in a later paragraph and for the moment are dealing only with "exceptional rates."

With regard to the definition of "exceptional charges" the terms "exceptional charges" and "exceptional rates" were in use at the time the Act of 1921 was passed, and were employed to denote charges that were lower than the "class rates" for the same commodity, in very much the same way as it was proposed that the "exceptional" under the new system should be below the "standard." The Act appears to have adopted the term and given it a somewhat more precise meaning. The definition seems to ensure that the "exceptional" must have a counterpart somewhere in the "standard," and that in the formation of the "exceptional" the charges in the "standard"—e.g., for conveyance or terminals, etc.—will, or rather must, be drawn upon and reproduced in the "exceptional" but lowered—i.e., paid for at a lower level. It seems, therefore, to follow that if "conveyance" is being paid for in the "exceptional," it must be paid for on the basis and in the form in which it is paid for in the standard rate, only at a lower rate: certainly upon the same "basis," otherwise there could be no comparison and no "lowering of the charge" in the standard: so that if the standard contains for conveyance a charge based on so much per ton per mile according to distance and class, the exceptional must also contain a charge of a similar nature. This view, which makes the exceptional a miniature counterpart of the standard where the same services are being rendered by the railways, is supported by a consideration of the "disintegration" provisions of s. 40. The conclusion therefore appears to be that as a railway company is to-day confined to charging for the conveyance of merchandise by the provisions of s. 32 to one of two alternatives (the "standard" or the "exceptional"), and as both of these are based on payment by distance (so much per ton per mile) a company is constrained to charge per consignment by distance, as they have no other resource.

At this point "the special charges continued subject to adjustment under the provisions of this Part of this Act" may be mentioned. They, as the definition shows, were created during the old regime before the Act of 1921, and were under certain circumstances to be brought over or "continued" into the new regime where they were not abolished by s. 34.

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The Act of 1921 contains no definition of them and any description or definition is, therefore, hazardous, but some attempt must be made to realize what these were before the situation can be explained. Speaking generally, they were charges which had not come into existence under the normal charging powers of a company, but had notwithstanding been agreed between a company and an individual or individuals, and in both the above senses were "special." They had also sometimes been "fixed by statute." For instance, a petitioner against a company's Bill might compromise on terms which included a "special charge" which went into the Act; a vendor might sell a piece of land to a company for their undertaking, and as part of the consideration bargain for and obtain a "special charge" for his traffic; he would then have given "valuable consideration" for it.

Under s. 34 of the Railways Act, 1921, all these "special charges" were abolished, with the relevant portions of the agreements or statutes under which they existed, with the exceptions mentioned in the section—namely, those which the Tribunal were bound to continue because they had been fixed by agreement or statutory provision for valuable consideration, and such cases other than the above which the Tribunal did in fact continue.

Thus some old "special charges" were carried over into the new system, but no power of creating "special charges" for the "conveyance of merchandise" was contained in the Act of 1921. To have done so would have been to undermine the system of rate regulation and adjustment which it was the object of the Act to establish.

The point we have to consider is whether, the powers of the companies to charge for the conveyance of merchandise by merchandise train being as we believe them to be as above, the companies can justify the proposals they are making in favour of Messrs. Robinson.

What the companies are proposing to do and in fact have already done is to contract with Messrs. Robinson to charge them for their traffic to the stations in this area, not the rates which stand upon their books and which are in each case the result of the application of the companies' statutory system of charging to the individual transaction, but to any station at any distance a flat charge of 7*s.* 2*d.* per ton, obtained by aggregating the amount paid in rates by Messrs. Robinson for the carriage of their merchandise to the 320 stations in a year and the amount which would have been paid in rates had their road traffic during that year been carried by rail, and dividing the total out again so as to give an average, or rather to charge them less by 5¾*d.* than the true average shown by the calculation, which was 7*s.* 7¾*d.* per ton. By this method the factor of charge per ton per mile according to distance is obliterated.

We are unable to recognize in this method any procedure which is authorized by their powers. We have not been referred to any such powers.

The resultant of this process, the 7*s.* 2*d.*, transcends the limitations of "standard" at the one end and is lower than the legitimate "exceptional" rates at the other. It is to be granted to one trader only.

Where the charges transcend the standard they are admittedly irrecoverable and their security is to depend upon "a gentleman's agreement." Considering that the whole structure of railway credit rests upon authorized and recoverable charges, this at first sight is a somewhat startling innovation. But upon consideration it may not be as startling as it appears. The old exceptional rates will still be in existence. Goods can be bought "free on rail," in which case the trader can pay the carriage charges himself; or "carriage paid," when the vendor will pay them and charge them in his account. Perhaps, when the "flat" charge is at or above the standard or exceptional rate, the trader will order his goods "free on rail" and pay on the basis of the existing rate, which is lower, and will only resort to "carriage paid" when the distance is long and the "flat" charge is less than the existing rate. It seems possible. This in our opinion would be an undesirable feature of any such scheme.

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Dealing with the case, as we do, largely upon legal grounds it is, perhaps, not necessary to dwell upon all the reactions which a system of flat charges imposed upon an area of statutory "exceptional charges" has and which have been brought to our notice. The evidence is conclusive that what the railway companies have done in favour of Messrs. Robinson has seriously affected the trade of the district, and by making undercutting by them possible put the business of other traders in peril. In our opinion the railway companies have no power so to contract, and this appears now to be their view, as they are applying to us for sanction to some of these charges as "exceptional rates." But the circumstances which make them questionable as charges by contract render them, in our opinion, impossible as "exceptional rates." What the companies' powers provide for is an appraisement of the price of the conveyance services which the companies are called upon to render in each particular case according to the charges authorized in its schedule of charges, with a lowering of these charges in cases to which exceptional rates are given. What the companies are doing in this case is to begin at the other end—the wrong unauthorized end—to aggregate all the results of all transactions with Messrs. Robinson at the 320 stations in a given year and redistribute them so as to produce one average rate applicable to each station. This procedure is not, in our opinion, authorized by their powers.

It is a portion of these charges which we are asked to authorize after it has been explained to us that the whole of which they are part has been produced in a manner which in our opinion is not authorized by the statutory powers of the company. We are unable to give our consent. They are not in our opinion "exceptional rates" within the meaning of the Act. They are not made "exceptional" simply because they have been compared with the "standard" and a percentage reduction shown. The comparison which the Act contemplates is, in our opinion, to be between two rates both authorized by the provisions of the Act. It does not contemplate or provide for a comparison between one rate constructed and authorized under the powers of the Act and another rate, as here, not so constructed and authorized.

Further, if they are, there is no evidence to show that, if our consent was given to the part of them submitted to us, the company would be better off and therefore nearer to the standard revenue than if it had been withheld. The impossibility of producing such evidence was indeed admitted by counsel for the companies.

In the course of the proceedings the applicants expressed themselves as willing, in the event of our consent being given, to make the rate subject to the conditions shown in the Appendix hereto.

APPENDIX.

To insert in Col. 6 Conditions.

1. Junction to station : 2 tons.

2. That payment is made by Messrs. J. Robinson & Co., Ld., on a maximum weight of 40,000 tons of the traffic per annum forwarded from Avonmouth Docks to places within the following area :—

All stations embraced in the area bounded as follows—

Avonmouth Docks down the Bristol Channel to Instow ;

Thence by a line drawn through North Tawton and Trusham to Dawlish ;

From Dawlish along English Channel to Poole ;

Southern Company's railway direct thence to Newton Tony ;

Thence by a line drawn through Ludgershall, Kitbury, Shrivenham, Highworth, Cricklade, Minety and Tetbury to Gloucester (excluding Nailsworth and Stroud) ;

From Gloucester down River Severn to Avonmouth Docks.

(The boundary points named above are included in the area.)

3. That all the described traffic controlled by Messrs. J. Robinson & Co., Ld., and forwarded by them from Avonmouth Docks or Bristol to places within the area and beyond is placed on rail.

NOTE.—The companies will, subject to the provisions of the Railways Act, 1921, apply exceptional rates arrived at

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upon a similar basis to traffic of the same character forwarded by any trader who will conform with conditions similar to the above.

The Great Western Railway Company appealed. The appeal was heard on May 18 and 19.

Hon. S. O. Henn Collins K.C., *A. Tylor* and *W. S. Morrison* for the appellants.

A. T. Miller K.C. and *Lionel Heald* for the Bristol Grain Importers' Defence Association; the Bristol, South Wales and West of England Cattle Food Trade Association; and the Bristol Incorporated Chamber of Commerce and Shipping.

Monckton K.C. and *F. Grant* for the National Association of Corn and Agricultural Merchants.

Cur. adv. vult.

May 31. The following judgments were read:—

SCRUTTON L.J. This is an appeal from a decision of the Railway Rates Tribunal appointed by the Railways Act, 1921, refusing to sanction a number of exceptional rates asked for by the Great Western Railway in respect of railway transit from Avonmouth Dock to a number of stations.

The peculiarity of the application is that the rate, sanction for which is asked, is the same, 7*s.* 2*d.* for every station, although the mileage to the stations differs widely, ranging from 17 miles to over 100 miles, and the "standard rate" which must be paid in the absence of a grant of exceptional rate varies from 7*s.* 3*d.* to 24*s.* 11*d.* This striking change is the result of an agreement made by the Great Western Railway with Messrs. Robinson, millers and merchants of Bristol, by which in consideration of Messrs. Robinson (who previously sent part of their goods, 12,000 tons, by road, and were thinking of extending their road transport) agreeing to send all their goods by rail, the railway company granted them a "flat rate" of 7*s.* 2*d.* from Avonmouth to every station in the application independently of distance.

However beneficial this agreement might be to the railway company and Messrs. Robinson, its effect would obviously be disastrous to other traders who had no "flat rate." The other trader, A., usually sold "free on rail" or "ex mill." In making a quotation of price to his buyer, he was met by the answer: "But if I accept your figure, I shall have to pay the standard rate by rail, say 20*s.* Messrs. Robinson offer me a much smaller rate based on their flat rate to that station of 7*s.* 2*d.*" A. finds that he can only get a "flat rate" of similar amount if he can give the railway company the benefit of abandoning a similar amount of road traffic which he may not have used. I have summarized briefly the result of Robinsons' flat rate on other traders.

This result in fact would obviously have great influence with any Tribunal considering whether it should sanction the flat rate or any question of undue preference arising out of the operation of the flat rate. For it is well established that a reduction of rate granted to one trader to induce him not to send goods by a competing route is an undue preference of one trader to another on the same railway for the same service on that railway: *London and North-Western Ry. Co.* v. *Evershed.* (1)

But the only appeal from the Tribunal open to us to consider is on a question of law, and, as I understand the judgment of the Tribunal, it is mainly that under the system of rates prescribed by the Act of 1921 it is illegal or impossible to fit in a flat rate agreement like the present, which as to part of its operation provides for rates in excess of the standard rates which could legally be recovered, and as to the other part of its operation entails rates which have no relation to distance carried and must seriously affect the business of other traders paying the standard rate and unable to secure a similar flat rate for themselves.

The Tribunal further take the view that there is no evidence before them that the exceptional rates asked for will enable the company to get nearer to the standard revenue they have hitherto failed under the present schedule of standard rates to obtain.

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(1) (1878) 3 App. Cas. 1029, 1035.

Before considering the question of the rates system prescribed by the Act of 1921, there is an unpleasant aspect of the railway company's action to be considered. Whatever may be the true construction of the Act of 1921, there is no question that the railway company have for a considerable time been deliberately breaking it. Sect. 37 of the Act enacts that the company shall not grant an exceptional rate less than 5 per cent. or more than 40 per cent. below the standard rate without the consent of the Railway Rates Tribunal. The railway company had for nearly a year before the decision of the Tribunal been granting and receiving a large number of such rates without the consent of the Tribunal, and has since the decision of the Tribunal refusing their consent continued to grant and receive such rates. The company makes no attempt to justify or excuse its action. Further, though by s. 37 the company is ordered to report any grant of exceptional rates to the Minister of Transport in order that he may refer to the Tribunal the question whether such rates prejudicially affect any class of railway users, or jeopardize the realization of the standard revenue of the company, the company have not in fact made any such report.

Their defence here is that "by existing practice" the statute has not been obeyed; the Tribunal itself when it gets an application forwards it to the Minister of Transport, who has the power to intervene as a party, and who anyhow has some anonymous representative in Court "watching" the proceedings. I think this is no excuse. For some considerable time, while the company were granting this exceptional rate, the Minister had no notice of the grant from anybody, and the company, as appears from the correspondence, were doing their best to keep secret from other traders the grant to Robinsons and its precise nature. But the mere grant without consent is, in my opinion, a substantial and serious breach of the law which it is very regrettable to find the company continuing to commit without any attempt to justify it.

The Court has considered whether it should decline to hear any appeal by such a law-breaker until the company has put itself in order by discontinuing the receiving of the flat rate charge, and by reporting to the Minister its intention to regrant it. As far as I am concerned, I only abstain from taking such a course on consideration of the delay which will be thereby occasioned in deciding a question which has got to be decided. But it must not be assumed that the same leniency will be shown to law-breakers in the future. Railway companies have received great and at the time very valuable privileges in return for undertaking certain obligations, and they must fulfil their obligations even if they are the Great Western Railway Company.

I turn now to the system of rates established by the Act of 1921. In amalgamating the railway companies of Great Britain it proposed to repeal the existing legislation "with respect to charges for or in connection with the carriage of merchandise." I do not think it is necessary to decide here the embarrassing question how much of the Acts of 1845, 1854, and 1888 this sweeping repeal left standing; it has given the Court some trouble already and will continue to trouble it in the future.

The new legislation required the Tribunal to settle a Schedule of standard charges—(s. 32)—no variation from which should be made except by way of an "exceptional rate," which was defined in s. 57 as "a rate below the standard charges." Why under these circumstances s. 32 talks about a variation of the standard charges "upwards" is not clear. The company in this case has not asked for approval of any exceptional rate above the standard charges, and agrees that it could not by law recover any such rate, an admission which apparently applies to at least eighty stations.

The Tribunal must show, by s. 30, and has shown in the Schedule, the rates for conveyance of merchandise and terminal charges in the form mentioned in the Fourth Schedule to the Act. That Schedule states the form of charges for conveyance as a charge according to distance

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"per ton per mile," a form inapplicable to a flat rate which is here one charge irrespective of distance conveyed. The standard terminals are a station terminal at each end and specified service terminals.

Such being the "standard rates," by s. 37 any "exceptional rates" less than 5 per cent. or more than 40 per cent. below the standard rates require the assent of the Railway Rates Tribunal. The company granted and received in the case of some 270 stations rates outside the limits for nearly a year without the assent of the Tribunal, and then applied for the assent of the Tribunal. If the Tribunal consented, it would then have—s. 40, sub-s. 1—to determine the amounts, if any, to be included in the rate for conveyance, station terminals, and service terminals.

This provision appears seriously to affect the weight of decisions under the former Acts, such as the two *Pickford* cases (*Pickford's Ld.* v. *L. & N. W. Ry. Co.*) (1) (2): see per Bigham J. (3) and per Buckley L.J. (4) It is there pointed out, with commercial good sense, that it is wrong to approach an exceptional rate as if it were originally built up of items for conveyance and terminals; it is fixed by reducing the ordinary charge to what the traffic will stand, without considering how much shall be charged for each item. But s. 40, sub-s. 1, requires the Tribunal, to fix the charge for each item in approving the exceptional rate, and the tactical devices which, as pointed out by Mr. Leslie in his Law of Transport by Railway, 2nd ed., at pp. 623 to 626, kept disintegration off the rate-book must disappear.

If the exceptional rates were within the 5 per cent. to 40 per cent. limit and so did not require the assent of the Tribunal: (1.) the company might, under s. 40, sub-s. 2, themselves disintegrate in their rate-book, in which case the disintegration was conclusive unless an interested trader complained that any item was unreasonable, in which case the company had to prove that the charge was reasonable;

(1) (1905) 12 Ry. & Can. Tr. Cas. 154.
(2) (1907) 13 Ry. & Can. Tr. Cas. 31.
(3) Ibid. 39, 47.
(4) Ibid. 77.

(2.) if the company did not disintegrate in their rate-book the statute disintegrated in the same proportions as the disintegration of the standard rate.

The railway company submitted to us sample disintegrations of their flat rate charge in the case of Clutton, 17¾ miles transit, and Ilfracombe, 106 miles. In the standard charges —7*s.* 3*d.* for Clutton, 19*s.* 2*d.* for Ilfracombe—the items for terminals were the same, as the work would be the same whatever the distance; and the carriage charge was 4*s.* 8½*d.* for Clutton, 16*s.* 7½*d.* for Ilfracombe, at a rate per ton per mile decreasing with distance carried. In the proposed flat rate charge, the same both for Clutton and Ilfracombe, the disintegration was suggested of reducing the terminal charges in the case of Ilfracombe, i.e. 11.42*d.*, to a little more than one-third of those for Clutton, i.e. 2*s.* 6.16*d.*; and putting down carriage as 4*s.* 7.84*d.* for Clutton, 17 miles, and 6*s.* 2.58*d.* for Ilfracombe, 106 miles. If the terminals had been kept the same for the same work and facilities at the same stations, the conveyance charge would have been: Clutton, 4*s.* 7.84*d.*; Ilfracombe, roughly 4*s.* 8*d.*—which is absurd.

I have considered the basis of the standard rate, the extreme improbability of the Tribunal ever disintegrating the flat rate under s. 40 in the way suggested by the company, the fact that the Robinson flat rate, or any rate like it, was only open to traders who had a large amount of existing road traffic to surrender to the company, the obvious injustice of the flat rate to small traders who still had to pay the standard rate, and the weight of the opinion of an experienced Tribunal which has been for years administering this system. In the result, I am convinced that the Tribunal were right in holding that a flat rate of this character, which entirely ignores distance carried, which fixes for a considerable portion of the area covered a rate higher than the standard rate which is irrecoverable at law, and for another considerable portion of the area covered a flat rate to one trader only which will prejudicially affect other traders and tend to the suppression of the small trader as against large amalgamations, has no place in law in the statutory system of the Act of 1921.

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The consideration that, as the railway company admit, they can give no evidence that the flat rate will bring the earnings of the railway nearer the standard revenue also justifies the decision of the Tribunal.

If I were wrong in the view I have taken as to the law, the application would have to go back to the Railway Rates Tribunal to be considered on its merits, a position which, in view of the present constitution of the Tribunal, might be one of considerable difficulty. But apart from that, the view already expressed by the Tribunal on the facts, including the effect of such a flat rate on other traders, renders it probable that the railway company do not lose much by being denied an opportunity of further discussion.

This appeal must be dismissed with costs.

SLESSER L.J. This appeal concerns an application by the Great Western Railway Company of September 22, 1932, submitted to the Railway Rates Tribunal in order to obtain their consent to the charging of exceptional rates in respect of the carriage of certain merchandise.

The traffic described in the application is "Oilcake and meals and husks for animal feeding in Class 8 of General Classification of Merchandise forwarded from Avonmouth Docks on account of Messrs. J. Robinson & Co., Ld." This proposal was the result of a bargain concluded between the railway company and Messrs. Robinson, merchants of Avonmouth, who are controlled by Messrs. Unilever, Ld., and since December, 1931, the railway has been charging Messrs. Robinson on many stations at the inclusive flat rate of 7*s.* 2*d.* for conveyance, services at Avonmouth Docks, stations terminals, covering and uncovering, irrespective of the distance to which the traffic was conveyed. The standard charges which have been fixed by the Railway Rates Tribunal for this and other railways are expressed normally so far as they are for conveyance in terms of per ton per mile.

In the present case, the rate, if allowed, would be charged on one uniform rate, irrespective of the distance the merchandise was carried, over an area extending approximately from Exeter in the west, to Gloucester, Salisbury and Swindon in the east. In such cases the standard charges would vary approximately from 7*s.* 3*d.* to 23*s.* 4*d.* in amount for all services rendered and from 4*s.* 8*d.* to 19*s.* 11*d.* for conveyance over a distance varying from seventeen to 106 miles.

The company in here asking for an exceptional rate invoke s. 37 of the Railways Act, 1921, which section imposes certain obligations upon a railway company who wish to have the liberty to grant exceptional rates in respect of merchandise. In the first place, for every such rate to be sanctioned it is necessary that it should be reported to the Minister of Transport within fourteen days or such longer period as the Minister may allow; and, secondly, a new exceptional rate may not, without the consent of the Railway Rates Tribunal, be granted if it be less than 5 per cent. or more than 40 per cent. below the standard rate chargeable (sub-s. 1).

The railway company, in defiance of these obligations, on and after December, 1931, proceeded to charge Messrs. Robinson 7*s.* 2*d.* In the first place they omitted altogether within fourteen days of their first so charging to report the matter to the Minister. This was a serious omission; for sub-s. 2 of s. 37 provides that, "if the Minister is of opinion that any company is granting new exceptional rates in such manner as prejudicially to affect any class of users of the railway not benefited by such rates, or so as to jeopardise the realisation of the standard revenue of such company, he may refer the matter" to the Tribunal, and this right he has, irrespective of whether the exceptional rate is or is not more than a certain per cent. below the standard rate charged. Moreover, he is entitled to appear and be heard in any proceedings before the Tribunal (s. 22, sub-s. 2). Thus, the failure to perform the statutory duty of notification may deprive the Tribunal of the assistance of the representative of the Minister in any particular case in which he ought or desires to be heard, which assistance may be of importance in considering questions of prejudice to other railway users as well as the effect on the standard revenue of the railway.

In the second place, the railway company are in default, because in the case of those new exceptional rates which are less than 5 per cent. or more than 40 per cent. below the standard rate chargeable, for which the consent of the Railway Rates Tribunal is required, no consent has been obtained, yet the charges have been made.

The application for consent was not made until September, 1932, and the special charge for the 208 out of 320 stations for which the consent of the Tribunal was so required was nevertheless levied from December, 1931, to September, 1932, illegally, without the consent of the Tribunal; was continued illegally during the hearing before the Tribunal, and has, as I understand, further been made illegally to the present time.

Such a series of wilful breaches of the law are entirely inexcusable and for some time I felt doubt whether, in the circumstances, this Court should not exercise its inherent jurisdiction to decline to consider the appeal at all. But, as I have come to an opinion on the merits of the case, clearly adverse to the railway company in any event, I think it would be unfortunate if, through declining to entertain the appeal, the company should be left with the possibility of again arguing that what they have attempted to do is allowed by law. I therefore proceed, after giving expression to the most serious condemnation of the company's conduct of which I am competent, short of declining to adjudicate upon the appeal, to consider the case as if the railway company were not in contempt of the Tribunal, of this Court and of the statute.

The Tribunal have come to the conclusion, on a consideration of the Railways Act, 1921, that they have no jurisdiction to authorize the flat rate sought. They say that the rate is not, in their opinion, an exceptional rate within the meaning of the Act, and the reasons which they gave for that conclusion, based principally on a consideration of the Railways Act, 1921, seem to me to be entirely sound ones; moreover I myself doubt whether, under the law as it existed before the passing of that statute, the railway companies had any power to compute conveyance charges otherwise than by mileage carried, notwithstanding that such charges might then be embedded in an undisintegrated rate for conveyance and terminal charges. Counsel could not tell us of any similar arrangement to the present before the Railways Act, 1921.

By the Railway Clauses Consolidation Act, 1845, s. 86, it was provided that it shall be lawful for a railway company to make such reasonable charges in respect of carrying and conveyance as they may from time to time determine upon not exceeding the tolls by the special Act authorized to be taken by them. The Special Acts (Rates and Charges) Confirmation Acts set out maximum rates for conveyance in terms of so much per mile; the amount chargeable per mile normally decreasing according to the distance conveyed, and it appears, therefore, that before the passing of the Railways Act, 1921, the maximum rates for conveyance were normally at the rate per ton per mile so that, even in those days (unless the Great Western Railway had special powers in that behalf, of which we were told nothing), it would have been impossible to have a charge for conveyance of goods irrespective of mileage. The terminal charges at the stations' terminals and the service charges would generally be irrespective of the mileage, but the total undisintegrated rate would include the conveyance rate ascertained by mileage per ton and by no other measure. So, also, special conveyance charges would have been calculated by mileage. In *Holwell Iron Co.* v. *Midland Ry. Co.* Farwell L.J. said (1): "If the agreement . . . . were illegal the case would be entirely different. For instance, if a company, in order to induce a trader to send his goods by their line, agreed to carry his goods at a fixed rate per ton, such agreement would be no answer to an application to the Commissioners by other traders."

The power here sought would not be any more justifiable even if it were extended to other traders, as was suggested by the company at the hearing. There is provision in s. 36 of the Railways Act, 1921, for the continuance of an agreement between the railway company and a particular trader, but such agreements, though recognized before the Act of 1921, for example in s. 2 of the Railway and Canal Traffic Act, 1854, and in s. 27 of the Railway and Canal Traffic Act, 1888, were never competent in my opinion to include a case of a flat rate for conveyance irrespective of mileage. But whatever doubt there may have been on this matter before 1921, the Railways Act of that year makes it clear to my mind that though an exceptional rate to a particular trader may still be possible as contemplated in s. 36 of that Act, such an exceptional rate whether new or continued can only be of the order of exceptional rates comparable with the standard rates, which have mileage as an integer. I refer in particular to s. 40, sub-s. 3 (*a*), which says: "(3) Where any such company in granting such an exceptional rate has not distinguished in the quotation for the rate or in the rate book the amounts included therein for such several services as aforesaid"—that is conveyance and terminal charges—"(*a*) the rate, in the case of a station-to-station rate, shall be deemed to be composed of conveyance rate and terminal charges in proportion to the amounts included in the corresponding standard rate for the same service and accommodation in respect of similar goods between the same stations."

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(1) [1910] 1 K. B. 296, 312.

Unless the special rate for conveyance were computed by mileage as is the standard rate, it would in my opinion be impossible on disintegration to obtain any comparable proportion between the rate and the terminal charges in the special rate and the attempt so to do in the notional disintegration put before us by the company of their flat rate; a disintegration which could only be achieved by charging for precisely similar services for non-conveyance rates different charges as the conveyance rates increase, shows the absurdities to which they are driven through absence of any mileage basis for charging. Thus, for example, in order to compensate for a notional increase over 4*s*. 7*d*. for seventeen miles' conveyance and 6*s*. 2*d*. for 106 miles' conveyance, a charge of 1*s.* 1*d.*-odd for station services at the near stations and 5*d.*-odd for the distance stations had to be assumed, when the statutory standard charges, as one would expect for such similar services, were precisely the same.

I agree with the Tribunal that the exceptional rate, to use their phrase, "is a miniature counterpart of the standard where the same services are being rendered by the railways," and that this appeal must be dismissed.

The railway company remain bound by s. 32 to charge the standard rates now fixed, and, in the absence of any application for consent to an exceptional rate which is within the jurisdiction of the Tribunal to approve, they can charge no other than the standard rate.

This appeal fails and must be dismissed with costs.

EVE J. I agree. I have nothing to add.

Appeal dismissed.

Solicitor for appellants: *A. G. Hubbard.*

Solicitors for Bristol Grain Importers' Defence Association and others: *Hancock & Willis, for Barry & Harris, Bristol.*

Solicitor for National Association of Corn and Agricultural Merchants: *Herbert Smith.*

R. F. S.

NOTE.

Railways Act, 1921, s. 22, sub-s. 2: " . . . . The Minister [of Transport] shall be entitled to appear and be heard in any proceedings before the [rates] tribunal."

Sect. 30, sub-s. 1: "The constituent companies in each group shall jointly . . . . submit to the rates tribunal not later than" December 31, 1922, "or such later date as the Minister may allow, a schedule of the standard charges proposed to be made by the amalgamated company into which they are to be formed, according to the classification fixed as aforesaid, and shall (except as hereinafter provided) show in that schedule the rates for the conveyance of merchandise, the amounts of terminal charges . . . . and every such schedule shall be published in such manner as the rates tribunal may direct."

Sub-s. 2: "The schedules so submitted shall be divided into the Parts and be in the form mentioned in the Fourth Schedule to this Act. . . . ."

Sect. 32: "On and from the appointed day the charges appearing in the schedule of charges as fixed by the rates tribunal for each amalgamated company (in this Part of this Act referred to as 'the standard charges') shall be the charges which that company shall be entitled to make for all services rendered in respect of which charges are fixed, and no variation either upwards or downwards shall be made from such authorized charges unless by way of an exceptional rate or an exceptional fare continued, granted, or fixed under the provisions of this Part of this Act, or in respect of competitive traffic in accordance therewith."

Sect. 34, sub-s. 1: "As from the appointed day all statutory provisions, and the provisions of all agreements with respect to classification of merchandise and with respect to charges for or in connection with the carriage of merchandise . . . . by any railway which becomes a railway of an amalgamated company, or of a railway company to which a schedule of standard charges is applied, shall to the extent to which those provisions relate to the matters aforesaid be repealed and cease to be operative . . . . except so far as, in the case of any such agreement or in the case of a statutory provision fixing a special charge, it may be continued under the provisions of this Part of this Act or by an order of the rates tribunal. . . . ."

Sub-s. 2: " . . . . in any case where it is proved to the satisfaction of the rates tribunal that any charge in operation on" August 4, 1914, "and fixed under any subsisting agreement or special statutory provision was originally so fixed for valuable consideration, the rates tribunal shall, and in any other case may, by order continue the charge, subject to such adjustment, if any, as to the tribunal may appear fair and equitable. . . . ."

Sect. 36, sub-s. 1: "On and from the appointed day all exceptional rates in operation immediately before the appointed day on the railway of any amalgamated company or any company to which a schedule of standard charges has been applied shall cease to operate, with the exception of such exceptional rates as—(*a*) are not less than five per cent. below the standard rates which would otherwise on and from the appointed day become chargeable; and (*b*) have been continued by agreement in writing between the railway company and the trader concerned or, failing agreement, have been notified in writing to the secretary of the railway company by the trader with a request that they should be referred to the rates tribunal for determination by them, in which case the rates shall continue until determined by the rates tribunal. . . . . Provided that, if the trader and the railway company agree to continue any rate which will be more than forty per cent. below the standard rate chargeable as aforesaid, the rate shall, before the appointed day, be referred to the rates tribunal, and, if so referred, shall continue until the tribunal have determined the matter."

Sub-s. 2: "Any such agreement or determination may provide for the continuance of any exceptional rate at the same or any higher figure or charge, not being, in the case of an agreement between a railway company and a trader, less than five per cent. nor more than forty per cent. below the standard rate chargeable, and for a specified period of time."

Sect. 37, sub-s. 1: "On and after the appointed day an amalgamated company or a railway company to which a schedule of standard charges has been applied shall be at liberty to grant new exceptional rates in respect of the carriage of any merchandise, which rates shall within fourteen days, or such longer period as the Minister may allow, be reported to the Minister; so, however, that a new exceptional rate so granted shall not, without the consent of the rates tribunal, be less than five per cent. or more than forty per cent. below the standard rate chargeable."

Sub-s. 2: "If the Minister is of opinion that any company is granting new exceptional rates in such manner as prejudicially to affect any class of users of the railway not benefited by such rates, or so as to jeopardise the realisation of the standard revenue of such company, he may refer the matter to the rates tribunal, who may, after giving all parties interested an opportunity of being heard, take either or both of the following courses: (*a*) revise the standard charges of that company or any of them: (*b*) cancel or modify all or any of such exceptional rates."

Sect. 40, sub-s. 1: "Where application is made to the rates tribunal to fix or sanction any exceptional rate for the carriage of merchandise between two stations, or between a station and a siding, or between two sidings, or between either a station or a siding and a junction, the rates tribunal in fixing or sanctioning the exceptional rate shall determine the amounts (if any) to be included in the rate for the following services:—(*a*) conveyance; (*b*) station terminals; (*c*) service terminals; (*d*) accommodation provided and services rendered at or in connection with a private siding."

Sub-s. 2: "Where an amalgamated company or a railway company to which a schedule of standard charges has been applied grants an exceptional rate for the carriage of merchandise between two stations, or between a station and a siding, or between two sidings, or between either a station or a siding and a junction, without referring to the rates tribunal, and the company shows in the quotation for the rate and in the rate book the amount (if any) included therein for such several services as aforesaid, the disintegration of the exceptional rate as so shown shall be conclusive unless a trader interested in the rate complains that the amount allocated to any particular service is unreasonable, in which event the onus of proof shall be on the railway company."

Sub-s. 3: "Where any such company in granting such an exceptional rate has not distinguished in the quotation for the rate or in the rate book the amounts included therein for such several services as aforesaid—(*a*) the rate, in the case of a station-to-station rate, shall be deemed to be composed of conveyance rate and terminal charges in proportion to the amounts included in the corresponding standard rate for the same service and accommodation in respect of similar goods between the same stations; and (*b*) in the case of any other rate, the company shall, within fourteen days after application in writing by any person interested in the disintegration of the rate, afford that person information of the amounts (if any) included in the rate for the several services aforesaid."

Sect. 57: "For the purposes of this Part of this Act, unless the context otherwise requires,—

"The expression 'charges' includes rates, fares, tolls, dues and other charges.

"The expression 'rates' means rates and other charges in connection with the carriage of merchandise.

"The expression 'exceptional charges' means charges below the standard charges, including special charges continued subject to adjustment under

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the provisions of this Part of this Act, and the expressions 'exceptional rates' and 'exceptional fares' shall be construed accordingly."

FOURTH SCHEDULE.

DIVISION AND FORM OF SCHEDULES OF CHARGES.

The parts into which every schedule of charges submitted by a company to the rates tribunal is to be divided shall be as follows:—

Part I. containing the charges in respect of the goods and minerals comprised in the several classes of merchandise (including dangerous goods and goods specially liable to damage) specified in the classification.

. . . .

The forms of the various Parts shall . . . . in the case of Parts I., II., III., and IV., be in the following forms:—

PART I.

GOODS AND MINERALS.

Class in respect of Merchandise to which Charges are applicable.	Standard Rates for Conveyance.				Standard Terminals.				
						Service Terminals.			
	For the first miles or any part of such Distance	For the next miles or any part of such Distance	For the next miles or any part of such Distance	For the remainder of the Distance	Station Terminals at each end.	Loading.	Unloading.	Covering.	Uncovering.
	Per Ton per Mile.	Per Ton per Mile.	Per Ton per Mile.	Per Ton per Mile.	Per Ton.	Per Ton.	Per Ton.	Per Ton.	Per Ton.
1									
2									
3 etc.									

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June 14.

[1933. M. 1210.]

Practice—Judgment against Defendant as a Married Woman—Mistake—Power to amend Judgment—R. S. C., Order XXVIII., *r.* 11.

The defendant was sued, and judgment was obtained against her, as Mrs. A., a married woman, the judgment being in the form settled in *Scott* v. *Morley* (1887) 20 Q. B. D. 120. In fact, the defendant was not Mrs. A. or a married woman, but was Mrs. W., a widow, she having kept back from, and actively misrepresented to, the Court her real name and status. On the real facts being ascertained the plaintiff applied by summons to the Master asking that the judgment should be altered to a personal judgment against the defendant as Mrs. W., a widow:—

Held, by Greer and Romer L.JJ. (Scrutton L.J. dissenting), that there was no jurisdiction to amend the judgment either under the slip rule or under the inherent jurisdiction of the Court, inasmuch as the judgment had been intentionally given in the form it was.

In re Swire (1885) 30 Ch. D. 239; *Preston Banking Co.* v. *Allsup & Sons* [1895] 1 Ch. 141; and *Ainsworth* v. *Wilding* [1896] 1 Ch. 673 followed.

Per Scrutton L.J.: The Court has an inherent jurisdiction to correct an error in a judgment which has been caused by the misrepresentation of a party. (1)

Appeal from a decision of Goddard J.

The plaintiff sued the defendant, whom he knew by the name of Mrs. Agard, to recover 175*l.* on a post-dated cheque which had been dishonoured. The solicitor then acting for the defendant, who also knew her only by the name of Mrs. Agard, entered appearance on her behalf as a married woman, and later an affidavit was filed by her under the name of E. H. Agard. In fact she was then a widow, and her name was not Mrs. Agard but Mrs. Watts; but this fact she had not disclosed, and it did not come to the knowledge of the plaintiff or his solicitors till after judgment had been signed against her under Order XIV. in the *Scott* v. *Morley* (2) form. When the fact as to her name and status became known the plaintiff applied by summons to the Master asking that the judgment should be altered by making it a personal judgment against the defendant. The Master refused that application, but on appeal Goddard J. amended the proceedings by substituting "widow" for "married woman."

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(1) See note post, p. 428.

(2) 20 Q. B. D. 120.

The defendant appealed.

Wilfrid Lewis for the appellant. There is no power in the Court to amend a judgment which has been drawn up and entered except in two cases: (1.) where there has been a slip in drawing it up, or (2.) where it does not correctly represent that which the Court intended: *In re Swire* (1); *Preston Banking Co.* v. *Allsup & Sons* (2); *Ainsworth* v. *Wilding.* (3) The slip rule—Order XXVIII., r. 11—applies only where there has been a clerical error or something akin to that. There was no clerical or other error in the judgment as drawn up; the slip rule therefore has no application. Moreover, the judgment as drawn up expressed precisely that which the Court intended it to express. In *Preston Banking Co.* v. *Allsup & Sons* (4) Lord Halsbury said that "even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to rehear it," and in the course of the argument he cited *Flower* v. *Lloyd* (5) in support of that proposition. Goddard J. in making the order he did relied on a passage in the judgment of Buckley L.J. in *Oxley* v. *Link* (6), but that passage does not support the proposition for which he used it.

J. P. Eddy for the respondent. As was said by Lindley L.J. in *In re Swire* (7): "There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal." Here the appellant misled the Court as she misled the respondent as to her name and status, and she therefore cannot be heard

(1) 30 Ch. D. 239.
(2) [1895] 1 Ch. 141.
(3) [1896] 1 Ch. 673.
(4) [1895] 1 Ch. 143.
(5) (1877) 6 Ch. D. 297.
(6) [1914] 2 K. B. 734, 741, 742.
(7) 30 Ch. D. 239, 246.

to say that the judgment drawn up expressed what the Court really intended. What the Court intended was to give an effective judgment for the respondent, and it was only prevented from doing so by the non-disclosure of the fact that the defendant was a widow. In *In re Swire* (1) Bowen L.J. also pointed out that every Court has inherent power over its own records as long as those records are within its power, and that it can set right any mistake in them. Again, in *Neale* v. *Gordon Lennox* (2) Lord Lindley, dealing with an order which had been drawn up, said: "It would be absolutely wrong, to my mind, for the Court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the Court never would have dreamt of making if the Court had known the facts." It was not suggested by Lord Lindley, as has been contended for the present appellant, that the only method of getting rid of the order was by a fresh action.

Wilfrid Lewis in reply. There is nothing in *Neale* v. *Gordon Lennox* (3) which in any way militates against the rule as stated in *Ainsworth* v. *Wilding* (4), which in fact was cited with approval in *R. M. K. R. M. Firm* v. *M. R. M. V. L. Firm.* (5) Moreover, *Neale* v. *Gordon Lennox* (3) is clearly distinguishable, as there it appeared that the parties had never consented to the reference which gave rise to the question.

Scrutton L.J. In this case, when the facts are ascertained, the course which the Court ought to take is to my mind clear. A lady was married to a Mr. Watts, but they separated, and for about seven years Mrs. Watts had been living as the wife of a Mr. Agard and had become known as Mrs. Agard, in which name she borrowed a sum of 175*l.* from Dr. MacCarthy, giving him a post-dated cheque in the name of E. H. Agard. On the due date—March 30, 1933—the cheque was not paid, and on April 6 Dr. MacCarthy issued a writ against Mrs. E. H. Agard, married woman, that, as I have said, being the name under which she had been living for six or seven years. Her husband, Mr. Watts, died in February, 1933, and consequently Mrs. E. H. Watts then became a widow. She heard of her husband's death at the end of March, just about the time that the cheque in question became due. Before an appearance was entered to the writ against her she had executed a bill of sale of all her furniture in the name of E. H. Watts, having then learnt that her husband was dead. The solicitor who was then acting on her behalf was instructed to enter an appearance to the writ, but he was told nothing about Mr. Watts, and knowing nothing of her real position, he entered an appearance for her in the name of E. H. Agard, married woman. The plaintiff not knowing the fact that she was a widow, and believing her to be Mrs. E. H. Agard, took out a summons under Order xiv., and on May 3 the lady made an affidavit in the name of E. H. Agard, married woman. That statement was quite untrue. She was not then a married woman, and she kept back from, and actively misrepresented to, the Court her real position. Judgment was entered against her on the Order xiv. summons in the *Scott* v. *Morley* (1) form. It is almost unnecessary to say that there are two forms of judgment against a woman—the ordinary form where she is a feme sole, and the other, in the *Scott* v. *Morley* (1) form, when she is a married woman. When it is in the latter form she is not personally liable, but, to use the language of Bowen L.J. in *Scott* v. *Morley* (1), is only subject to a "proprietary liability," the judgment being against her separate property. The Married Women's Property Act, 1893, has relieved a plaintiff from showing whether the female defendant who is being sued had any separate property when the debt was incurred. The result in the present case is that a judgment has been entered against her in a way much more favourable to her than if she had told the truth, and I suppose there is no doubt that if the Court had known the facts on May 3 when judgment was entered, that judgment would have been entered not in the *Scott* v. *Morley* (1) form but in the absolute form—namely, against her as a feme sole. On the judgment as entered the plaintiff tried to obtain a bankruptcy order against the defendant, but was told by the bankruptcy officials that such an order cannot be made on a judgment in the *Scott* v. *Morley* (1) form: see *In re Frances Handford & Co.* (2) As the judgment would not have been in the form it was if the real facts had been known, what is to be done? What happened when the real facts were ascertained was this: a summons was taken out before the Master to amend the judgment. The Master held that he had no power to set it aside or amend it, but on appeal Goddard J. took the view that the matter can be put right in this way—by discharging the judgment and amending the title of the action by substituting Watts for Agard. The appellant—the defendant—comes to this Court and says that the judge had no power to make that order, and it is contended that the only way to get rid of the judgment is to bring an action to have it set aside. In my opinion, although my learned brethren do not agree with me, the appeal should be dismissed on one of two grounds: first, I think that on facts like those we are dealing with, it is within the inherent jurisdiction of the Court to correct an error caused by the active misrepresentation of a party. That inherent power has been exercised in many cases, and generally, I hope, for the purpose of doing justice between the parties and to the public, because misrepresentation by a party is a matter of public as well as of private interest. One of the cases in which this inherent power has been exercised is where the nominal plaintiff turns out to be dead and where in ignorance of that fact judgment has been entered in his favour. Similarly the Court has exercised its inherent power where a writ has been issued against or by a company which at the time is non-existent. In *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou* (3) I said: "If it comes to the knowledge of the Court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside." I took the view that it was within the inherent power of the Court to set aside the judgment even where no claim to have it set aside was made by one of the parties. That decision was affirmed in the House of Lords. (1) A similar case came before Russell J. in *Tetlow* v. *Orela, Ld.* (2) There a writ was issued in the name of the plaintiff in a passing-off action. It turned out that the plaintiff had been dead for nearly eight years, and the person who was using his name was his widow and executrix who was carrying on the business. Russell J., on being asked to substitute the widow for the dead man, declined to do so. There, again, the inherent power of the Court was used to set aside the writ and all subsequent proceedings, because the fact was brought to the attention of the Court that there was no such person as the plaintiff, and consequently the whole proceedings were a nullity. In my view this is a case in which the Court is entitled to say: "You, the appellant, have deceived us and have thereby induced us to give a judgment in a form to which you were not entitled; we therefore decline to allow you to keep the judgment obtained in that form by your deception." I should be sorry to think that the inherent power of the Court is to be in any way limited by rules.

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(1) 30 Ch. D. 239.
(2) [1902] A. C. 465, 473.
(3) [1902] A. C. 465.
(4) [1896] 1 Ch. 673.
(5) [1926] A. C. 761, 771.

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(1) 20 Q. B. D. 120, 128.

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(1) 20 Q. B. D. 120.
(2) [1899] 1 Q. B. 566, 569.
(3) [1932] 1 K. B. 617, 624.

The second ground upon which I think this appeal should be dismissed is that the judge was justified in the view he took by the observations of Buckley L.J. in *Oxley* v. *Link.* (3) That was the converse of the present case, the judgment having been drawn up as a personal judgment against a married woman instead of one in the *Scott* v. *Morley* (4) form. The plaintiff took out a summons for leave to amend. Buckley L.J. there said (5): "I should have no doubt myself that the only proper order in this case is to discharge this judgment and leave the plaintiffs, if they are so entitled, to obtain some other judgment. That is what the order of the Master has done." That appears to me to be exactly what Goddard J. has done here. He has discharged the judgment which was given and left the respondent to obtain, if he can, a judgment in the form in which, if the appellant had stated the real facts, he would have been entitled. On these two grounds the appeal in my opinion should be dismissed.

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(1) [1933] A. C. 289.
(2) [1920] 2 Ch. 24.
(3) [1914] 2 K. B. 734.
(4) 20 Q. B. D. 120.
(5) [1914] 2 K. B. 742.

Greer L.J. I have regretfully come to a different conclusion. The plaintiff issued his writ against E. H. Agard, a married woman, and obtained judgment against her in the *Scott* v. *Morley* (1) form as he asked. The Court was represented by the Master, who has jurisdiction to try cases under Order xiv., but the position is the same as if the case had been tried out in Court with witnesses. If a judge has been misled by the evidence, the only way the aggrieved party can deal with it is to appeal to this Court to have the judgment set aside and entered for the right party, or to obtain an order for a new trial. Instead of appealing from the judgment that was entered in this case and saying that it should be reversed because it was given in the form in which it was, and the action was brought in the form it was by reason of the false pretence of the appellant that she was Mrs. Agard, a married woman, the respondent applied by summons to the Master to amend the judgment. If proper proceedings were taken I cannot conceive that this judgment would be allowed to stand, but that is not the question we have to determine. The question for us is whether under the rules relating to procedure the Court can under the slip rule or under its inherent jurisdiction set aside a judgment which has been intentionally entered in the way it was, or whether the Court is bound to leave the party aggrieved to the remedy of appealing or bringing an action to set aside the judgment. With regard to the slip rule, that applies when it is found that a clerical mistake has been made in drawing up a

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(1) 20 Q. B. D. 120.

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judgment. That rule, however, has no application to the present case. No doubt the judgment was drawn up by a clerk in the office, but as drawn up it accurately represented what the Master decided. In the Annual Practice for 1933 the statement on p. 480 accurately represents the position. It is there said: "The error or omission must be an error in expressing the manifest intention of the Court; the Court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of the order, such as a mistake due to a misunderstanding of a rule or statute. If the order as drawn correctly expressed the intention, it cannot be corrected under this rule or the inherent jurisdiction, even if the decision of the Court is procured by fraud or misrepresentation." Various cases are cited to this effect. It seems to me that apart from the cases it is very difficult to put together words which would enable the order asked for in this case to be made without completely upsetting the practice which has hitherto prevailed of leaning to the view that wherever a judgment is founded on some misrepresentation of the facts it cannot be set aside by application to the judge. For example, if a judgment has been obtained by a statement which can be proved to be false, made by a party, and it is right to set it aside in the way the judge did, it would be difficult to say that the Court might not set aside a judgment on the ground that the judge was wrongly misled by the evidence given before him. If that is true as regards a judgment obtained by false evidence, how are we to stop at that? It would be equally true in a case in which it was demonstrated that the judge mistook the effect of the evidence. The true remedy is to appeal to the Court of Appeal, and not to apply to the judge to set aside the judgment on the ground that he has made a mistake either in fact or in law. The decisions in *In re Swire* (1), *Oxley* v. *Link* (2) and the others cited by Mr. Lewis show that this cannot be done, and that the true view is that where the Court has intentionally given a judgment and there is no mistake in drawing it up—no mistake in words—the only way to correct it is either by appeal, or, in certain cases, by an action brought to have it set aside. That was laid down in *Ainsworth* v. *Wilding* (1), where, on a motion to discharge a judgment given at the trial which had been passed and entered, Romer J. said this (2): "I think that a fresh action must be brought and that I have no jurisdiction to hear the matter on motion, at any rate without the consent of the parties." That observation applies to the facts of this case.

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(1) 30 Ch. D. 239.

(2) [1914] 2 K. B. 734.

As I have said, I regret having to come to this conclusion, because I cannot help thinking that the remedy by appeal or by a fresh action to set aside the judgment when the facts are so clear is unfortunately a cumbrous and expensive way of correcting a wrong judgment. It looks like using a steam-hammer to crack a nut. In my opinion there should be some rule to fit such a case as this so that a judgment might be corrected without the necessity of appeal or fresh action.

Romer L.J. I also come with regret to the conclusion that this appeal should be allowed. I should like, if possible, to find a short and inexpensive cut for arriving at the result which the plaintiff may eventually reach by a longer and more expensive route, but I think it is impossible to affirm the decision of Goddard J. without departing from the principle which has been laid down by authorities which are binding on this Court. The principle was stated thus by Romer J. in *Ainsworth* v. *Wilding* (3): "So far as I am aware, the only cases in which the Court can interfere after the passing and entering of the judgment are these: (1.) Where there has been an accidental slip in the judgment as drawn up—in which case the Court has power to rectify it under Order xxviii., r. 11; (2.) when the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended." Romer J. obviously had in mind the decisions in *In re Swire* (4), and *Preston Banking Co.* v. *Allsup & Sons.* (5) I will not refer again to

(1) [1896] 1 Ch. 673.
(2) Ibid. 676.
(3) [1896] 1 Ch. 677.
(4) 30 Ch. D. 239.
(5) [1895] 1 Ch. 141.

the judgments in *In re Swire* (1), and will only say this, that no one can read the observations of Cotton and Lindley L.JJ. in that case without realizing that they were intending to define and limit the circumstances in which a judgment can be corrected or discharged after it has been passed and entered. I should like, however, to refer to *Preston Banking Co.* v. *Allsup & Sons* (2) for this reason, that in that case the Court was brought face to face with an order which it was alleged had been obtained from the Court by misrepresentation. An order had been made as to certain costs which were directed to be paid in a certain event by the applicant. At a later date one Lindsay, a receiver and manager of the defendant company, applied for a variation of that order so that they should be made part of his costs in the action on the ground that when the original order was made there had been a misrepresentation as to the value of the company's assets. Notwithstanding that, the Court of Appeal affirmed the decision of the Vice-Chancellor of the County Palatine of Lancaster. Lord Halsbury, who was a member of the Court, said this (3): "If by mistake or otherwise an order has been drawn up which does not express the intention of the Court, the Court must always have jurisdiction to correct it. But this is an application to the Vice-Chancellor in effect to rehear an order which he intended to make, but which, it is said, he ought not to have made. Even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to rehear it. If such a jurisdiction existed it would be most mischievous. The fact that in the present case the application to rehear is made to the particular judge who made the order is immaterial; for if one judge can rehear the order another can." It has been contended by Mr. Eddy that in the present case the Court intended to give an effective judgment against the appellant. Having regard to the facts before him the Master was led to believe that the appellant was a married woman, and in those circumstances the judgment was in the *Scott* v. *Morley* (4) form.

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(1) 30 Ch. D. 239.

(2) [1895] 1 Ch. 141.

(3) [1895] 1 Ch. 143.

(4) 20 Q. B. D. 120.

That was the intention of the Court, and in those circumstances it is impossible to alter that order and make it one under which the appellant should be unconditionally liable. Scrutton L.J., from whose opinion I differ with the greatest hesitation, has referred to *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou* (1) and other cases where one of the parties was non-existent; but in those cases there was no judgment before the Court at all. The Court did not set aside the judgment; it disregarded it because there was no party in existence. The present case does not fall within that category, for here there certainly is a judgment against the appellant. The judgment drawn up gave effect, and no more than effect, to the intention of the Court, and in those circumstances it is impossible for us to interfere with it. In *Oxley* v. *Link* (2), as I understand it, there is nothing inconsistent with the views I have expressed. There, two summonses were taken out: (1.) to have a judgment which had been obtained some years previously amended by making it a *Scott* v. *Morley* (3) judgment, and (2.) a summons by the defendant—the judgment having been signed against her by default—to have that judgment set aside. The Master had made an order on that summons setting aside the judgment. It is to that part of the order that Buckley L.J. was, as I understand, referring when, after stating that the slip rule did not apply, he said (4): "Further, even if the Order did apply to it, I should have no doubt myself that the only proper order in this case is to discharge this judgment and leave the plaintiffs, if they are so entitled, to obtain some other judgment. That is what the order of the Master has done." What he is there saying is, that if the slip rule had applied, he would not alter the judgment but set it aside as the Master had done on the defendant's summons. For these reasons I do not think that *Oxley* v. *Link* (2) is an authority for the order made by Goddard J.

Appeal allowed.

(1) [1932] 1 K. B. 617.
(2) [1914] 2 K. B. 734.
(3) 20 Q. B. D. 120.
(4) [1914] 2 K. B. 741, 742.

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[The Court, on the application of J. P. Eddy, extended the time for appealing from the order of the Master entering judgment in the form he did. (1)]

Solicitors for appellant: *T. R. Frost & Co.*

Solicitors for respondent: *Bartlett & Gregory, for Bartlett & Sons, Sherborne.*

J. S. H.

(1) Pursuant to the leave thus given for an extension of time for appealing from the Master's order, the plaintiff in the action appealed to the judge in chambers (Humphreys J.) and asked that the judgment should be altered from the *Scott* v. *Morley* form into a personal judgment against the defendant as Mrs. Watts. Humphreys J. having refused that application, the plaintiff appealed.

J. P. Eddy for the appellant.

Beyfus K.C. and *Manningham-Buller* for the respondent.

July 11. Scrutton L.J. In this case judgment was entered in the *Scott* v. *Morley* form instead of in the form given at p. 1757 of the Annual Practice for 1933 which is applicable in the case of a widow who had made a contract during coverture. The present appellant (the plaintiff in the action) tried to get rid of the judgment as entered, and Goddard J. acceded to that application. On appeal from his order to this Court, the majority took the view that it was made without jurisdiction, but we all thought that it was wrong that a judgment against a widow should be entered in the *Scott* v. *Morley* form, and we gave leave to amend the title of the action and extended the time for appealing against the original judgment. Humphreys J. apparently misunderstood the position and dismissed the appeal. In my opinion the judgment should be in the form given at p. 1757 of the Annual Practice, that being the form approved by the Court of Appeal in *Barnett* v. *Howard* [1900] 2 Q. B. 784. Consequently this appeal must be allowed but without costs, and judgment will be entered under the amended title in that form. We do not decide what can be done under the amended judgment, but we hope that the lady will pay her debts.

Greer and Romer L.JJ. agreed.

Appeal allowed.

R. F. S.

BOLSOVER COLLIERY COMPANY, LIMITED *v.* OXCROFT COLLIERY COMPANY, LIMITED.

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1933
June 14.

Workmen's Compensation—Industrial Disease—Miners' Nystagmus—Agreement by last Employers as to Amount of Compensation—Proceedings by last Employers against previous Employers for Contribution —Whether Amount of Compensation in Dispute—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*c*) (*iii.*).

Sect. 43 of the Workmen's Compensation Act, 1925, which entitles a workman certified to be disabled by an industrial disease to recover compensation under the Act, provides in sub-s. 1 (*c*) that "the compensation shall be recoverable from the employer who last employed the workman" during the twelve months preceding the date of disablement "in the employment to the nature of which the disease was due: Provided that— . . . . (*iii.*) If the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation, or, if the amount of compensation is not in dispute, as may be determined by arbitration under this Act":—

Held, that in a case where the last employer has agreed the amount of compensation with the workman, the compensation is no longer in dispute, although a previous employer is resisting the last employer's claim for contributions; and the claim for contributions will be determined by arbitration proceedings between the employers.

APPEAL from an award of the judge of the Chesterfield County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

On July 13, 1932, John Henry Harthill was taken on as a miner by the applicants, for whom he worked at the coal face for only a few shifts. On July 19, 1932, he was examined by the applicants' doctor and found to be suffering from nystagmus and dismissed. On July 22, 1932, the certifying surgeon for the district certified that the workman was suffering from miners' nystagmus and was thereby disabled from earning full wages at the work at which he had been employed. There was no appeal by the applicants against this certificate, but they admitted their liability to pay, and paid the workman 1*l.* 3*s.* 9*d.* a week on the basis of total incapacity from the date of the certificate. At the end of

August, 1932, the applicants claimed from the respondents contribution of 31/34ths of the compensation payable, on the ground that out of the thirty-four weeks for which the workman had been employed in the twelve months preceding the date of disablement the respondents had been his employers for thirty-one weeks. This claim was resisted by the respondents, and in December, 1932, the applicants commenced these proceedings for the determination of the liability of the respondents to make contributions under s. 43, sub-s. 1 (*c*) (iii.), of the Workmen's Compensation Act, 1925, and of the amount of such contributions.

At the hearing before the county court judge the technical objection was taken to the proceedings that, as the liability to contribute was in dispute, it could not be said that the amount of compensation was not " in dispute," with the result that under s. 43, sub-s. 1 (*c*) (iii.), of the Act, the claim to contribution could only be determined in " the arbitration under this Act for settling the amount of the compensation."

The county court judge upheld this objection, on the ground that there was nothing to limit the meaning of the words " in dispute " to a dispute between a workman and his last employer, and dismissed the application.

The applicants appealed.

W. Shakespeare for the appellants. The amount of compensation can only be " in dispute " within s. 43, sub-s. 1 (*c*) (iii.), so long as it has not been agreed between the workman and the last employers. By " the amount " of compensation is meant the amount payable by the employers immediately responsible to the workman, and it has nothing to do with the contributions to be made by other employers, a matter in which the workman is not directly concerned. Further, if the last employers agree the compensation with the workman, that in no way binds the other employers, and in so far as it is material they can put the correct quantum of the compensation in issue in the proceedings for contributions.

[He was stopped.]

Jardine K.C. and *John Neal* for the respondents. It is inherently just that the person who has to pay should be heard. The respondents were excluded by statute from appearing before the certifying surgeon or the medical referee, although they were particularly anxious to do so, but it ought to be open to the respondents to appear in the workman's proceedings for compensation, as they do not admit their liability to contribute.

[LORD HANWORTH M.R. You could raise any issues as to the workman's right to compensation in the existing proceedings.]

It is submitted not. Thus it would not be open to the respondents in these proceedings to say that their pit was such a good one that no one could by working there get miners' nystagmus. Are the respondents not in the difficulty that these proceedings are brought on the footing that the amount of compensation is not in dispute? It is contended that the last employer cannot get contribution in such proceedings as this, unless the compensation is not in dispute not only as between the workman and the last employer, but also as between that employer and previous employers within a year before the date of disablement. Otherwise the proper course is to leave the workman to bring proceedings for compensation, and then for the last employer to bring any previous employer in by a third party notice: see Workmen's Compensation Rules, 1926, rr. 20, 21.

[No reply was called for.]

LORD HANWORTH M.R. In this case the question that has arisen is as to the construction to be put upon s. 43, sub-s. 1 (*c*) (iii.), of the Workmen's Compensation Act, 1925. [His Lordship stated the facts.] Sect. 43 provides that upon the workman getting a certificate from a certifying surgeon that he is suffering from an industrial disease and is disabled thereby he is, if the disease has been contracted in the course of his employment, brought within the ambit of the Workmen's Compensation Act for the purpose of having compensation paid to him; and he is entitled to compensation as if the date of the disablement or, if none is certified, the date of the certificate of the certifying surgeon, were treated as the date of the accident. By s. 43, sub-s. 1 (*c*), the compensation that is thus to be paid to the workman is "recoverable from the employer who last employed the workman" during the twelve months preceding the date of disablement "in the employment to the nature of which the disease was due." I turn to consider how that sum of compensation is to be ascertained. Sect. 21 provides the general procedure for determining compensation, and it says: "If any question arises in any proceedings under this Act . . . . as to the amount . . . . of compensation . . . . the question, if not settled by agreement, shall, subject to the provisions of this Act, be settled" by arbitration. To my mind there is in s. 21 a clear indication that, if possible, the course should be adopted of settling by agreement. It would indeed be a sad day if a construction was put upon any part of this Act of Parliament which militated against agreements being reached between workmen and their employers. To my mind s. 21 quite clearly indicates that the primary mode of settling the compensation is, if possible, by agreement, and only in default of agreement are you to go to arbitration. Now the compensation, if settled by agreement, will have to be paid by the last employer. That is plain under s. 43, sub-s. 1 (*c*), to which, however, there are certain provisos, and the third of them is: "If the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined." I pause there to point out that so far this proviso gives a right to the employer from whom the compensation is recoverable to receive contributions from other persons who have employed the workman in the course of the last twelve months. What contributions?—"such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation." If arbitration proceedings were brought by the workman against the employers in order to settle the compensation, because they were unable to come to an agreement about it, then there would be an opportunity under the third party procedure of applying for the contributor to be brought in. There are Workmen's Compensation Rules providing for notice to be given to persons against whom indemnity or contribution is claimed, and those persons can then be brought in under what is called the third party procedure. So that it is contemplated in this proviso that in default of agreement the amount of the contribution shall be determined in the arbitration under this Act for settling the amount of compensation—namely, by third party procedure. But there is another case contemplated, a case where there is no such arbitration and where there has been no need for an arbitration, because the primary method of determining the compensation to be paid by agreement has been employed; and the proviso contains the alternative provision to the effect that "if the amount of compensation is not in dispute," then the contributions are to be "such contributions as . . . . may be determined by arbitration under this Act." An independent arbitration is therefore contemplated in such cases, as there are no proceedings to which the contributors could be brought in as third parties. In such a case there can be a claim for a contribution, and that may be determined, as between the immediate employer who is liable and the person who he alleges to be his contributor, by an arbitration under this Act. It appears to me that that is the plain meaning of the terms of the Act of Parliament. I cannot see that any privilege or right is taken away from the contributor, because, as we have said in the course of the argument, it will be open in the arbitration which takes place between the employer liable and the alleged contributor for the contributor to raise all such points as are germane to the issue between him and the employer primarily liable, such as that this employer has made an improvident agreement with the workman, or that he has agreed to pay too much, or that there is under the particular circumstances no possibility of the workman having suffered from the disease while in the employ of the alleged contributor, and the like. There will thus be wide issues between the employer liable and the alleged contributor, for it will be necessary for the employer liable to make out his case for the quantum of contribution which he seeks to impute to his contributor. This method seems to me to be clearly indicated by the Act.

The appeal must be allowed with costs, and the case will go back to the county court judge for him to determine these wide issues which I think are open to an alleged contributor. The appeal is allowed with costs.

Lawrence L.J. I agree. Under s. 43, sub-s. 1 (*c*), of the Act, the last employer during the twelve months previous to the date of the disablement is liable to pay compensation to the workman. That last employer is entitled under the same section to recover contributions from the other employers during that period, but there is nothing in the Act to compel the last employer who is liable to pay the compensation to refuse to pay it unless the workman brings arbitration proceedings against him, nor is there anything in the Act to compel the last employer, even if proceedings are brought against him by the workman, to bring in the other employers during that period as third parties. Nor is there anything in the Act to make it a condition precedent to the claim for contribution that there should have been any proceedings between the workman and the last employer, nor that the other employers against whom the proceedings for contribution are claimed should have been parties to any agreement or any arbitration between the last employer and the workman. It seems to me plain on the construction of the Act that the last employer is entitled to come to an agreement with the workman as to the amount of compensation; and that if there are proceedings between the workman and the last employer those proceedings will settle the amount of compensation payable; in neither case need the other employers necessarily be parties to the settlement of the amount of compensation. In any event when the

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amount of compensation has been settled, whether by arbitration or by agreement and whether with the consent or without the consent of the other employers, it is not in dispute within the meaning of this section when the last employer claims contribution from the other employers; it has been settled between the only person liable to pay and the only person entitled to receive the compensation; what is in dispute is the claim to contribution. No doubt there is great force in saying that the last employer ought in fairness to consult the other employers who are liable to contribute before coming to an agreement as to the amount of the compensation, but there is nothing in the Act to compel him to do so. The result of his not doing so is that when he claims contribution from the other employers he may be met by this: "You have improperly agreed to pay an amount of compensation which is greater than the amount you were liable for and, therefore, we are not liable to contribute to the full amount which you have chosen to agree." Of course, there are other defences open to the claim for contribution on the part of other employers besides the one I have mentioned, but the mere fact that they raise the issue that the amount of compensation settled between the last employer and the workman was an improper amount does not, in my opinion, result in the amount of compensation being in dispute within the meaning of the section. The workman became entitled to a certain amount of compensation, and there is no longer any dispute between him and his last employer or between him and any of his other employers as to the amount of the compensation which will have to be paid to him. The only question then remaining is whether any and which of the other employers are bound to contribute, and if so to what extent, towards the payments of compensation. In settling that question the arbitrator is entitled to go into the question whether the amount of compensation was properly arrived at, although that question is no longer open as regards the workman.

For these reasons I agree that the appeal succeeds and ought to be allowed with costs.

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SLESSER L.J. I agree that this appeal should be allowed. In my view the learned county court judge has misconstrued the last limb of para. *c* (iii.) of s. 43, sub-s. 1, of the Act, in that he has concentrated his mind too exclusively upon the meaning of the word "dispute." When the sub-section is carefully considered the dispute which is there referred to is a dispute as to the amount of compensation. The actual language is "or if the amount of compensation is not in dispute." The dispute here, if there be a dispute between these two employers, is not about the amount of compensation but about the amount of contribution, which is a different matter. There is here no dispute as to the amount of compensation to be determined by arbitration under s. 21 of the Act as applied by s. 43. The real dispute here is whether there shall be a contribution as between a previous employer and the last employer, because, as has been pointed out, the compensation has to be paid by the employer who last employed the workman. It is clear to my mind that this is a case where, there being no amount of compensation in dispute, the amount of contribution is a matter to be determined by an arbitration under this Act, that is to say, an arbitration between the one employer and the other. So read this sub-clause seems to me to provide a complete machinery for dealing with the two possible cases. If the workman has a dispute with the last employer about the amount of compensation, that last employer may bring in other employers under r. 41, sub-r. 5, as third parties by serving the proper notices. If there be no dispute as to the amount of compensation but only as to contribution—which is I think the only other possible position—then that matter being a dispute solely about the amount of contribution and not about compensation may be determined by arbitration under the Act as between the one employer and the other. So read the provision produces no difficulties at all. In my view the second limb is dealing expressly and is intended to deal with the case where there is primarily no dispute as between the last employer and the workman but only a dispute as to contribution between one employer and another. To read para. *c* (iii.) as the learned judge has done is to make a hiatus in the Act and in substance to say that, where there is no dispute between the last employer and the workman and there is a dispute about the amount of contribution, that matter cannot be determined at all under the Act. It is clear that if the learned judge is right there would be no means of determining this dispute about contribution, because obviously the last employer cannot compel the other employers to add the workman in order to have his dispute determined. I would only add that, in my view, there is no obligation that I can see on the employer who has last employed the workman during the twelve months preceding the date of disablement to impose any requirements or conditions on other employers; he is primarily liable, and if there are rights to be decided as between him and the others they must be determined by arbitration, but I can find no obligation upon any one employer to give any notification to the others of what he is about to do or in any way to seek to obtain their consent to any settlement which he may make directly with the workman. If that settlement is improvident or if there is anything to be determined upon it that may be a fit matter for the arbitration as between one employer and the other; but primarily, as it seems to me, the last employer may make such settlement with the workman as he likes in order to dispose of any need for an arbitration at all.

Appeal allowed.

Solicitors: *Peacock & Goddard, for Elliot, Smith & Co., Mansfield; Corbin, Greener & Cook, for Arthur Neal & Co., Sheffield.*

H. C. G.

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July 7.

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Charterparty—Berth Contract—Lay Days—Demurrage—Time lost whilst Steamer in Loading Berth owing to Work being impossible through Rain to be added to Loading Time—Time lost through Rain—No Cargo ready at Time for Loading—Time not added to Lay Days.

Under the terms of a berth contract a steamer was to proceed to one, two or three places on the Danube and there load a full and complete cargo of wheat and/or grain. The berth contract provided that the cargo was to be loaded at a certain rate and that " should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain . . . . the amount of actual time so lost during which it is impossible to work owing to rain . . . . to be added to the loading time. . . . . In calculating the extra time to be added to the lay days on account of interruptions by rain . . . . periods of less than three hours shall be reckoned as quarter days." The charterers occupied in loading the steamer 3 days 20 hours beyond the lay days allowed for loading. Whilst the vessel was lying in loading berth in two ports ready to receive cargo rain occurred on certain occasions during working hours to an extent which would have made it impossible to load cargo into the ship had cargo been alongside. The total of the rainy periods amounted to two days. At the particular time when rain occurred the charterers had not booked cargo with shippers, although cargo was available in the port, and no cargo was alongside the ship at those times. In an arbitration the arbitrator held that the rainy periods, amounting to two days in all, were to be added to the lay days, notwithstanding that cargo was not alongside at such time, and that the shipowners were entitled to 1 day 20 hours demurrage.

Upon the hearing of a special case MacKinnon J. held that the work of loading had not been interrupted by rain, as the work of loading had not at that time commenced. The shipowners were therefore entitled to 3 days 20 hours demurrage. On appeal by the charterers :—

Held, by Greer and Romer L.JJ. (Scrutton L.J. dissenting), dismissing the appeal, that the charterers, in order to bring themselves within the clause of the berth contract, must prove both that the work of loading cargo became impossible through rain and also that in consequence they lost time in loading. In the present case the charterers had not proved that the impossibility of loading owing to rain had caused them to lose time unloading.

Appeal from a decision of MacKinnon J.

By a contract, dated April 9, 1931, and made between the Burnett Steamship Company, Ld., the owners of the steamship *Burnhope* (called in the award " the claimants "), and Joint Danube and Black Sea Shipping Agencies (called in the award "the respondents") by their respective agents on the Chamber of Shipping Berth Contract, 1911, form known as the "Dancon," it was agreed (inter alia) that the *Burnhope* should proceed as ordered to one, two or three places in the Danube not above Braila and there load from one or more shippers in not exceeding three customary berths always afloat a full and complete cargo of wheat and/or grain and/or seed for carriage to certain ports as ordered in accordance with the terms and conditions set out in the berth contract.

By clause 4: "Cargo shall be loaded at the average rate of 400 units per running day (Sundays and non-working holidays excepted). Time for loading to count from the morning after steamer's arrival and report at the customs, she being then in free pratique and ready to load in all her holds, and written notice of readiness given, such notice to be given between the hours of 9 A.M. and 5 P.M. on ordinary working days. If a second or third loading port be used, time there shall commence to count from noon of day of arrival, provided steamer is reported at customs and in free pratique before noon, or from the following morning, if steamer is not reported and in free pratique until after noon.

"Charterers have the right of working during the excepted period without counting the time, also at night time, they paying all extra expenses incurred thereby.

"Orders for second or third loading port if used to be given before the steamer finishes loading at first and second ports respectively.

"Captain to declare in writing, upon arrival at first loading port, the quantity required for a full cargo of heavy grain.

"Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm, or by steamer being ordered by the Port Authorities to 'break out of berth' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain, snow or storm, or by 'breaking out of berth,' to be added to the loading time, but in no case shall the allowance for any or all of the foregoing circumstances

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exceed, in the aggregate, time amounting to three days. In calculating the extra time to be added to the lay days on account of interruptions by rain, snow, storm, or 'breaking out of berth,' periods of less than three hours shall be reckoned as quarter days. Time for rigging stages and shifting berths not to count as loading time.

"Should charterers not provide a loading berth on steamer's arrival and readiness as above, and in consequence thereof demurrage accrue, the owners shall only be entitled to half the demurrage rate for the first six running days which the steamer loses by waiting for a berth, but for any further time lost full demurrage rate as per clause 9 shall be paid.

"Subject to the above provisions, time for loading shall count continuously whether steamer is in berth or not, any custom or regulations of the port or ports to the contrary notwithstanding.

"The steamer shall allow 10*l*. if loaded at one port only."

Clause 8: ". . . . Lay days to be calculated on steamer's total cargo capacity . . . ."

Clause 9: "If the steamer be longer detained than the time stipulated above, demurrage shall be paid day by day at the rate of 30*l*. per running day or pro rata . . . ."

Clause 21: "In the event of any dispute arising under this contract, such dispute shall be referred to two arbitrators in London, one to be appointed by each of the parties to the reference, with power to such arbitrators in case of disagreement to appoint an umpire whose award shall be final. The arbitrators and umpire to be commercial men and resident in London."

Clause 29: "For all time saved in loading steamer to pay 15*l*. per day despatch money or pro rata for any part of a day, including Sundays and holidays saved."

Disputes having arisen under the berth contract between the parties, they agreed to vary the submission and to refer the disputes to Frederick Charles Lohden, shipbroker of the City of London, as sole arbitrator, who stated his award in the form of a special case for the opinion of the Court on a point of law relating to the claim for extra demurrage.

The steamship *Burnhope* duly proceeded to the Danube and loaded at three Danubian ports—namely, Kilia, Braila and Galatz, completing her cargo at Varna in the Black Sea. In the arbitration the claimants put forward a claim for six and a half days' extra demurrage amounting to 195*l.* (the respondents having already paid one day's demurrage, 30*l.*).

The arbitrator found the following facts :—

(*a*) At the rate provided in clause 4 of the berth contract the lay days allowed for loading the said steamer amounted to 15 days 13 hours. The respondents occupied in all 19 days 9 hours in loading the steamer.

(*b*) Whilst the vessel was lying in loading berth at Braila and Galatz ready to receive cargo, rain occurred on certain occasions during working hours to an extent which would have made it impossible to work cargo into the ship had cargo been alongside. The arbitrator found that the total of the periods during which such rain occurred amounted to two days in all.

(*c*) When a steamer was chartered on the Danube berth contract, charterers who were not merchants (the respondents were not merchants) did not load her with cargo belonging to themselves, but they sub-let space in the steamer to various shippers according to the latter's individual requirements. Such charterers, of course, endeavoured to obtain rates of freight from the shippers which would enable the charterers to pay to the shipowners the berth contract freight and show a profit to themselves. It was the duty of the shippers towards the charterers to provide cargo to fill the space so engaged and to have their cargo ready for loading when required. This practice was well known to shipowners and was contemplated by the words, " and there load from one or more shippers " used in clause 1 of the Danube Berth Contract, 1911.

(*d*) At the time when such rain occurred as aforesaid cargo of the description contracted to be loaded under the said berth contract was available in the port in the sense that the respondents could have obtained such cargo from various shippers had the respondents been willing to accept the rate of freight offered by such shippers. The arbitrator found that the respondents had not booked cargo with shippers at the particular times when such rain occurred and no cargo was alongside for loading on the vessel at those times.

In the arbitration the claimants contended that the rainy periods as aforesaid should be counted as loading time and not added to the lay days on the ground that the respondents had no cargo ready for loading and that therefore they were not prevented from loading by the bad weather. The respondents contended that the said rainy periods should be added to the lay days on the ground that the lay days under the berth contract were for (1.) waiting for orders, (2.) waiting for cargo, and (3.) loading the cargo, and that therefore there was no obligation upon them to have cargo ready for loading during the said rainy periods in order to obtain an addition to the lay days under clause 4.

If the said rainy periods, amounting to two days in all as aforesaid, were not to be added to the lay days, as contended by the claimants, then the steamer was on demurrage for 3 days 20 hours. If the said two days were to be added to the lay days, as contended by the respondents, then the lay days amounted to 17 days 13 hours, and the steamer was on demurrage for 1 day 20 hours.

The question which the arbitrator stated for the opinion of the Court was whether upon the true construction of the berth contract, and in particular of the following portion of clause 4 thereof and on the facts found by the arbitrator in the case the said two days were to be added to the loading time or not: "Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm, or by steamer being ordered by the Port Authorities to 'break out of berth' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain, snow or storm, or by 'breaking out of berth,' to be added to the loading time. . . ."

Subject to the opinion of the Court the arbitrator awarded that the claimants were entitled to 1 day 20 hours demurrage, and he awarded and directed that the respondents should pay to the claimants 22*l.* 16*s.*, being demurrage for the said period at the contract rate less 4 per cent. commission and less the 30*l.* already paid as stated above.

If the Court should be of opinion that the said two days should not be added to the lay days, then he awarded that the claimants were entitled to 3 days 20 hours demurrage, and he awarded and directed that the respondents should pay to the claimants the sum of 80*l.* 8*s.*, being demurrage for the said period at the contract rate less 4 per cent. commission and less the 30*l.* already paid as aforesaid.

Upon the hearing of the special case MacKinnon J. said: In my judgment it is not possible in this case to say that any time was "lost" owing to work being impossible through rain. Before the rain began no cargo was being loaded, because there was no cargo there to be loaded, and after the rain stopped no resumption of the loading took place, because there still was no cargo there available to be loaded. There was no interruption of the work of loading by rain. The work of loading had not commenced, and was not going on, and was therefore not interrupted.

Although I so far agree with Sir Robert Aske that it is not necessary in order to entitle the charterers to avail themselves of this clause that the cargo should be actually alongside the vessel, I think it is still necessary for the charterers to prove that the operation of loading the cargo on board the ship was prevented by rain, and that but for the rain the cargo would have been loaded, in the sense that either it was there, or that it was so near and so available that it could have been brought there so as to be capable of being loaded during the time when the rain took place.

The result is that in my judgment I think the arbitrator has made a mistake in the view he has taken. He seems to me to have treated this as though there was to be an extension of the lay time if rain occurred during the time when the cargo ought to have been loaded, and that that extension has to be made whether the business of loading is

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or is not in fact interrupted by the rain. Upon that view he has relieved the charterers from the obligation of paying demurrage for those two days the equivalent of the various periods when rain was falling. I think that the charterers ought not to be entitled to be relieved from that liability, and that they ought to pay demurrage during those two days. The result of that is that I have to express the opinion that the award should be in the alternative form stated by the arbitrator.

The charterers (respondents in the award) appealed.

Sir Robert Aske for the charterers (respondents in the award). The contention of the charterers is that as loading was impossible for two days owing to the rain they are entitled to have those two days added to the lay days. Greer J. in *Vergottis* v. *William Cory & Son, Ld.* (1), discussed the obligation of a shipper with regard to the loading of a cargo. He said that the shipper's obligation to provide the cargo at the port of loading did not "mean that he must always have the whole of the cargo at the port when the ship arrives . . . . the obligation to provide the cargo would be fulfilled if the shipper made and carried out arrangements for the delivery of the cargo at the ship's side in time to load her in accordance with the terms of the charterparty." Therefore when there are periods during which loading is impossible by reason of exceptions in the charterparty the charterer is not bound to have his cargo ready for loading at such times. It is sufficient if at the times when loading can take place the charterer has his cargo ready for loading. The arbitrator has decided the question of fact in my favour.

[ROMER L.J. The question is whether any time was lost by reason of rain.]

The findings of fact by the arbitrator do not support the judgment of MacKinnon J. There is no finding that there had been no interruption in the loading by reason of rain or that loading had not commenced at the time of the rain or that the cargo would not have been alongside if it had not rained.

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(1) [1926] 2 K. B. 344, 353.

[ROMER L.J. The arbitrator does not find that loading did not take place because of rain.]

He found that loading was impossible by reason of rain. He merely found that the charterer had not booked cargo at the time when the rain fell. There is no doubt that loading was impossible and that time was lost owing to rain. The words "interruption by rain" in clause 4 must be construed narrowly. If loading cannot take place for two days owing to rain there would be an interruption by rain whether cargo was there or not.

W. L. McNair for the shipowners (claimants in the award). This type of contract, which is the standard form for berth contracts, differs from an ordinary charterparty in that it does not provide for weather working days. The arbitration proceeded on the assumption that it was only necessary for the charterers to prove that rain occurred which would prevent loading. The clause, however, contemplates the actual facts and not a hypothetical state of facts. The charterers are not entitled to an extension of the lay days unless they can prove that they have been actually prevented from loading by rain.

[SCRUTTON L.J. Was it not intended to give the charterers fifteen weather working days as lay days ?]

No. It was intended by the berth contract to give the charterers fifteen days within which to load, and the time lost owing to rain was to be added to the lay days. The term used in the contract is "time so lost" which appears to indicate that time may be lost but cannot be added to the lay days because it was not "so lost." It is not sufficient for the charterers merely to prove that work was made impossible through rain ; they must also prove that time was actually lost to the charterers through rain. *Vergottis* v. *William Cory & Son, Ld.* (1), was a very different case from the present case. That case turned upon the fact that something had to be done to enable a ship to get into a particular dock. The charterers cannot say that time was lost owing to rain when the time would have been lost whether

(1) [1926] 2 K. B. 344.

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it had rained or not, because the cargo was not alongside ready to be loaded. Rain did not prevent the loading of this cargo, although in the abstract it might have prevented the loading of the ship. No cargo was being loaded at the time the rain commenced, and therefore there was no interruption of loading by rain. It is stated in Scrutton on Charterparties, 13th ed., art. 42, p. 152, that "the charterer must perform his part of the operation of putting the cargo on board, unless excused by express exceptions, the causes excepted being proved not merely to exist but also directly to prevent the loading of the ship": see *The Village Belle.* (1) "Interruption by rain" connotes that some process was going on. There can be no interruption of loading unless loading had commenced and was going on. The charterers were not entitled to any extension of time.

Sir Robert Aske replied.

SCRUTTON L.J. This is a short question, but calling it short does not make it easy. A very experienced commercial arbitrator, who has probably decided as many charterparty cases as any judge on the Bench, has decided one way, and a very experienced commercial judge has decided the other way, and there is a division of opinion in this Court. I have come to the conclusion that the arbitrator was right, but I can quite understand the view taken by those who think the learned judge was right.

This is a Danube berth charter, which means that the charterer is not himself providing the cargo to be loaded, he is going, as it is called, to put the vessel on the berth and make individual contracts with shippers by which he hopes to fill up the ship at a sub-contract freight which will leave him a profit on the charter freight. The vessel is going to load at two or possibly three ports in the Danube; it is going to move about and pick up its cargo where it can. One of the most important matters to have provided for is, the time within which the charterer must load the vessel. He is entitled to keep the ship at the loading places for a certain

(1) (1874) 30 L. T. 232.

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amount of time by paying freight. If he exceeds that time he will have to pay demurrage, and there are various kinds of provisions providing how long he may keep the ship loading before he pays any demurrage. One very common way of doing it is by giving him a fixed number of days within which to load. When a charterer has a fixed number of days within which to load the ship, he is not bound to load the ship on every day; so long as he loads the ship within the fixed number of days, he need not load on any particular days. There may be cases, and *Vergottis* v. *William Cory & Son, Ld.* (1), to which we have been referred, is one, where the ship has to go into a particular dock which has regulations which require the charterer to have cargo in the dock before the vessel is admitted; but that is quite a different case. He may be liable for damages in such a case for having contracted to load the ship in a dock and not having the necessary cargo which the dock regulations require before the ship can get in. There is nothing of that sort in this case. This particular contract is: "Cargo shall be loaded at the average rate of 400 units per running day." The "average rate," of course, shows that the charterer need not load 400 tons on any particular day; so long as at the end of the fixed number of days he has loaded his cargo into the ship, he has completed his contract, and he is not liable because on certain particular days he did not load any cargo at all; and as he is not liable if on a particular day he does not load any cargo, obviously he need not so far as the charterparty is concerned have any cargo there on that particular day. The charterer is to load the ship at the average rate of 400 units per running day, and the time he has for loading will depend on the size of the ship, and will amount in this case to 15 days 13 hours, I call it 15 days for simplicity, Sundays and non-working holidays excepted. If the 15 running days include a Sunday it is not to be counted, if they include a non-working holiday, whatever that may be, it is not to be counted, and there is no question that it could not be contended that a Sunday or non-working holiday must be included in the 15 running days, because the charterer had no cargo alongside on the Sunday, or no cargo alongside on the non-working holiday. Then there comes another class of cases: What about weather? The charterer is to have 15 days for loading. Supposing it rains on the 15 days, is he to have only 15 days for loading or is he to have any more? That is very frequently dealt with by the clause saying that the charterer is to have so many weather working days. In that case it is quite clear that it would be no answer to say to the charterer, it is true that Monday was not a weather working day, but inasmuch as no cargo was alongside the ship on that day it must count as a weather working day. That is quite clear, in fact Mr. McNair does not attempt to dispute it. There are other forms in which the running days are extended in the ordinary forms of charter: for instance, all along the Pacific coast of South America there are practically no harbours, and cargo is taken from shore to ship in lighters, and there is frequently surf: in many charterparties there is a clause that surf days do not count, and surf days are generally certified by the master of the port. It would be no answer again for the shipowner to say to the charterer: It is true that a particular day was a surf day, but inasmuch as you had no cargo there on that day you cannot count it as a surf day. The answer of the charterer both in regard to weather working days and to surf days would be: I am under no obligation to have cargo there every minute of every day: I do not break my contract if on a particular day I have no cargo either alongside or contracted for, so long as in the fixed period of 15 days I load the ship. Now it may be that the charterer will load in less than the time he has contracted to load in. Then there comes in a despatch clause for all time saved in loading the steamer, and the time saved in loading is that the ship can get away quicker than the time which under the contract the shipowner has allowed the charterer within which to load the ship. It is time saved, less time than the contract time for loading. In this contract there is a provision with regard to weather, which is not time saved, but time lost—the opposite to time saved—kept longer than the contract time. The clause is: "Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm, or by steamer being ordered by the Port Authorities to 'break out of berth' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain, snow or storm, or by 'breaking out of berth,' to be added to the loading time" —I must take the time during which it is impossible to work owing to rain, snow or storm as a definition of "actual time so lost"—the actual time in which it is impossible to work, and in respect of which therefore part of the 15 days is of no use, because it is impossible to work in it, and such time is to be added to the running days which the charterer has for loading on the assumption that he can work on them.

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(1) [1926] 2 K. B. 344.

The opposite view is this: Should any time be lost the amount of actual time so lost is to be added to the loading time, that means that the charterer must show that the time has been lost because of the rain, and if he had no cargo alongside, though he was not bound to have any cargo alongside, and though it was no breach of his contract not to have cargo alongside, if he has no cargo alongside when the rain occurs then the time is not so lost, although if he happened to have cargo alongside he could not have put it on board. Now I do not agree with that view. I think the time saved and time lost both relate to the contract time within which the charterer must load the ship. It is assumed there are so many days which the charterer has in which to load the ship; if he loads in less he has saved the ship time, but if he takes more days in loading the ship he has lost the ship time, and if in the running days that the charterer has within which to load the ship there are so many days on which he cannot load the ship, and on which it is impossible to load the ship, because of rain, those days are to be added to the days which by contract the charterer has in which to load the ship. That is a short statement of the two points. A commercial arbitrator has taken one view, and the learned judge has taken the other. Using such knowledge as I have, I agree with the commercial arbitrator; and I believe my brothers do not.

Greer L.J. In this case I agree with the view taken by MacKinnon J. of the facts stated by the arbitrator in his award. The case is a case of first impression. One cannot gather from the authorities any guide as to what construction should be put upon this contract except from the general principles that are always adopted in construing contracts. I agree with my Lord that this is a contract to load in a fixed time. It is necessary to do a little arithmetic to find out the fixed time, but when that sum has been done it is clear that the fixed time is 15 days 13 hours. The charterer has to load the ship in that time unless he can find in the terms of the charterparty an excuse for not loading in that time, or some provision that the period which would otherwise be the period has been extended by the terms of the charter. The question arises under this clause: "Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm, or by steamer being ordered by the Port Authorities to 'break out of berth' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain, snow or storm, or by 'breaking out of berth,' to be added to the loading time, but in no case shall the allowance for any or all of the foregoing circumstances exceed, in the aggregate, time amounting to three days." As I read the award, I treat it as a finding that it was not established by the evidence that any cargo was available during the rainy periods, it was not a case of a continuous two days' rain, but of rainy periods happening at two different places which added together amounted in all to two days. I ask myself whether under those circumstances it can be said that the charterer has brought himself within the words of the charterparty which entitle him to an extension of time. I think those words mean this: there are two things that he has to prove in order to entitle him to that extension of time, and if he fails to prove either of those two things he fails to establish his right to an extension of time. He has to prove that work became impossible through rain, and that in consequence of that he lost time in loading; unless he proves both those circumstances he does not bring himself within the clause. He did prove that there were hours of time, amounting in all to two days, in which work was impossible through rain, but he did not prove that that resulted in any loss of time by him, because on the facts as found he was not there ready to utilize the time, and, therefore, he cannot say that he has established that it was the impossibility of loading that caused him to lose that time.

The result of that is that if I am right in my view, which I hold with some hesitation, as my Lord takes a different view, it follows that the charterer has not established any right under this charterparty to an extension of his days of loading, and that, therefore, the learned judge was right, and the arbitrator was wrong.

Romer L.J. It is a little embarrassing for me to have to cast the deciding vote on a question of construction of a document that is described by MacKinnon J. as really almost indistinguishable from a charterparty, when Scrutton L.J. and Greer L.J. take diametrically opposite views upon that question. But unless, and I have no reason to suppose it is so, different principles of construction apply to such a document from those that are applied to the construction of any other document, I confess that I find myself unable to disagree with the view that has been expressed by MacKinnon J. and by Greer L.J.

The question is really a very short one, and it is this: Upon the facts found by the arbitrator, is it possible for the charterer to say that the two days to which the arbitrator refers in his award were lost owing to work being impossible through rain? The test of the question is this: Would that time have been lost if there had been no rain during those two days? The answer obviously is that the time would have been lost had those days been perfectly fine, because at the time that the rain was going on there was no cargo which could be loaded into the vessel. The arbitrator has not found, as was suggested by Sir Robert Aske was the case, that the charterer failed to secure cargo alongside the vessel at those times owing to the rain. I am not surprised that there is no such finding, because it would amount to this, that the charterer refrained from ordering cargo to be present alongside the vessel at these particular times, because he foresaw that at these particular times it would be raining. It is possible, of course, that he is as good a weather prophet as that, though I doubt it; if he were his proper place would be at the Meteorological Office. But inasmuch as it appears to be quite plain on the findings of fact, that had these times been fine instead of rainy, the time taken in loading the vessel would have been exactly the same, neither more nor less, the charterers have failed to establish that the time was lost owing to rain.

For these reasons I think the decision of MacKinnon J. was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *W. & W. Stocken.*
Solicitors for respondents: *Botterell & Roche.*

R. F. S.

TART *v.* G. W. CHITTY AND COMPANY, LIMITED.

1931
June 12.

Negligence—Highway, Lorry on at Night without Rear Light—Collision with Motor Cycle—Contributory Negligence of Motor Cyclist.

The defendants' Foden steam lorry was entering the town of New Romney at 5.45 P.M. on January 3, 1930, a wild and stormy night, when it was discovered that the tail light had gone out. The driver drew up at a dark spot in a street. The near side wheels were 9 inches from the kerb and the off wheels were just over the crown of the road, which was 14 feet wide. Those in charge of the lorry endeavoured to relight the rear lamp. While so engaged the plaintiff, who was riding a motor cycle, ran into the rear of the lorry and was seriously injured. The plaintiff had a lamp on his motor cycle which cast a beam of light for 15 yards and he said in evidence that he could easily pull up within 15 yards. He brought an action against the defendants to recover damages for his personal injuries sustained as he alleged through the negligence of the defendants' servants. The defendants alleged that the plaintiff's own negligence was the sole or contributory cause of the accident. The county court judge held that the defendants' servants had been negligent in stopping the lorry in the place where they did and that the plaintiff had not been guilty of contributory negligence, and he gave judgment for the plaintiff. On appeal by the defendants:—

Held, that on the facts the accident happened either because the plaintiff was not keeping a proper look-out or because he was going too quickly and had not his motor cycle under such control that he was able to avoid the collision, and in either event he was guilty of negligence.

Butterfield v. *Forrester* (1809) 11 East, 60, and *Page* v. *Richards and Draper* (1920) unreported, followed.

APPEAL from a judgment of the judge of the Ashford County Court.

The plaintiff, Frank Robert Tart, brought an action against the defendants, G. W. Chitty & Co., Ld., claiming damages for personal injuries sustained, as he alleged, through the negligence of the defendants' servants. The defendants alleged that the plaintiff had brought about his injuries by his own negligence, which was either the sole cause of the accident or contributed to the accident.

The plaintiff himself knew nothing about the accident, because he was very severely injured, and for three weeks after the accident he was unconscious. When he recovered consciousness he remembered nothing about the accident or the events immediately preceding it.

The following statement of facts is taken from the judgment of Swift J.:—

The facts were really not in dispute and were proved before the learned county court judge to be these: On January 3, 1930, at about 5.45 P.M., a Foden steam lorry, owned by the defendants and in charge of their servants, and which was travelling through a portion of the county of Kent, came into the town of New Romney. It was a wild night, raining hard and blowing a gale. Before the lorry arrived in New Romney those in charge of it had had trouble with their tail light, and when they entered the town of New Romney it was discovered that the tail light had gone out. Thereupon the driver of the lorry drew it up in the High Street in New Romney at a place which was between two lighted shops, but which was described by all the witnesses as very dark, the darkest place he could find. The lorry stopped with its near wheels about 9 inches from the kerb and its off wheels slightly over the crown of the road, which was 14 feet wide, the lorry occupying a little more than half the roadway of the High Street. The lorry having stopped, Huntley, the conductor, went to the rear of the lorry and endeavoured to relight the lamp.

Whilst Huntley was at the back of the lorry endeavouring to relight the tail lamp, a motor cycle driven by the plaintiff came along the High Street. He had a lamp on his bicycle which, according to his evidence, cast a beam of light for 15 yards, and, according to his evidence, he could easily pull up his motor bicycle in 15 yards. Apparently he did not observe either the motor lorry or the man who was standing at the back of it endeavouring to light the tail lamp. We do not know, because he cannot tell us. According to Huntley's evidence, when the plaintiff was about three yards away from him Huntley realized that the motor bicycle was coming on to him and he jumped to the kerb and avoided it. The plaintiff struck the motor lorry at the rear on the offside, was hurled across the road on to the kerb on his right-hand side and sustained severe injuries.

The county court judge found that the defendants' servants who were in charge of the lorry were negligent in stopping it in the place where they did and in the circumstances that they did, and that the plaintiff had not been guilty of contributory negligence, and he awarded the plaintiff the sum of 400*l.*

The defendants appealed.

B. O'Malley for the defendants.

Comyns Carr K.C. and *R. Eagle* for the plaintiff.

Swift J. [stated the facts set out above, and continued :] On those facts the county court judge found that the defendants' servants were guilty of negligence, and from that finding there has been no appeal. He then had to consider the further question whether the plaintiff had been guilty of contributory negligence. He said : "I have to weigh the matter in the balance and see whether there is any evidence of negligence on the part of the defendants, and whether there was any contributory negligence on the part of the plaintiff ; could he have avoided the consequence of the defendants' negligence if there had been any ?" That is in my view a perfectly clear and proper direction to himself, or statement by himself, of the law relating to this matter. Having found that those in charge of the lorry were guilty of negligence, he had then to ask himself whether the plaintiff could by the exercise of ordinary reasonable care, which is demanded of a motor cyclist travelling along such a road under such conditions as were pertaining that night, have avoided the result of the defendants' negligence. The county court judge, having put that question to himself, came to the conclusion that in truth the plaintiff had not been guilty of negligence, that in the circumstances of this case he was not satisfied that the plaintiff could by the exercise of ordinary reasonable care have avoided the result of this accident, and he, therefore, gave judgment for the plaintiff for the sum of 400*l.* From that judgment the defendants appeal.

It has not been disputed before us that the defendants' servants were initially in this matter guilty of negligence.

They put upon the highway an obstruction which was improperly lighted in that it had no lights of its own at the back, and in that none of the surrounding lights of the town, the lights of the shop windows or the street lamps, illuminated it at all. The county court judge said that they were negligent in stopping in that position. Then what happened ? The plaintiff ran into it, and it seems to me that he must have run into it for one of two reasons: either he was not keeping a proper look-out, such a look-out as a reasonable man riding a motor cycle along that street would have kept on such a night; or, if he were keeping a proper look-out, he was travelling at such a speed that he was unable to stop his motor cycle or to swerve from the course he was pursuing in such a way as to avoid colliding with the obstruction which had been put in front of him. One of those two things must have happened, and if that be so, then the plaintiff must, in fact and in law, have been guilty of negligence. The county court judge has said that he was not guilty of negligence. We are not sitting here to review his decision on the facts, nor to come to any conclusion of our own upon the facts if there was evidence upon which the county court judge could come to the conclusion to which he has arrived ; we are sitting here merely to see that he has properly applied the law in this case. The question, therefore, is whether we can interfere with what he has done.

In my view the question whether there is or is not evidence upon which a judgment may be founded is always a question of law. If there is evidence, then the judgment cannot be disturbed by this Court, however profoundly this Court may disagree with it. But if there is no evidence then, as a matter of law, the judgment can and ought to be interfered with. Is there any evidence here upon which the county court judge could find that the plaintiff had not been guilty of negligence ? There is the undisputed fact that he drove his motor cycle on to this obstructive steam lorry. That cannot be disputed. There is no evidence to the contrary. That fact points to one conclusion only: either the plaintiff was not keeping a proper look-out, in which case he was, as a matter of law, guilty of negligence; or, if he was keeping a look-out, he was going too quickly or for some other reason had not his motor cycle under such proper control that he was able to avoid this collision. I think there was no evidence upon which the county court judge could come to the conclusion he did that the plaintiff was not guilty of contributory negligence. It is said, and said perfectly rightly, that the onus was upon the defendants to prove that the plaintiff was guilty of contributory negligence and that they have not done so, because the county court judge says, in spite of all the evidence: "I am not satisfied that the plaintiff could by the exercise of ordinary reasonable care have avoided the result of the accident." In my opinion, the evidence being all one way, he ought to have been satisfied, and if, the evidence being all one way and proving conclusively that there was negligence on the part of the plaintiff, the county court judge still says "I am not satisfied," in my view he errs in a matter of law.

I am fortified in the view which I take of this case by the judgments of Rowlatt and McCardie JJ. in *Page* v. *Richards & Draper* (1), which was decided in this Court on November 8, 1920, even if I am not bound by the decision, although I am inclined to think I am bound. Rowlatt J. in that case said: "The plaintiff, who was walking along the road, knew nothing material to the case except that he was struck in the back by a motor car, and the driver of the motor car never saw the plaintiff until he struck him. That is all. Upon those facts the county court judge has found that there was no negligence on the part of the driver, but I do not think he can possibly have found that without making a mistake in point of law or misdirecting himself, as it is sometimes called —misunderstanding the law and misapplying the principles. It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has

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(1) Unreported.

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wift J.

seen it. If there is any difficulty in the way of his seeing, as, for example, a fog, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the defendant is in this dilemma, either he was not keeping a sufficient look-out, or if he was keeping the best look-out possible then he was going too fast for the look-out that could be kept. I really do not see how it can be said that there was no negligence in running into the back of a man. If he had had better lights or had kept a better look-out the probability is that the accident would never have happened." McCardie J. said: "About 10 o'clock on a night in July of last year, the plaintiff was walking home with one or two friends—and while he was so walking along a car driven by the defendant, Draper, came up behind. The lights of that car would show at least 30 yards ahead, yet in spite of that fact, the car drove into the plaintiff, Page, and caused him serious hurt. In those circumstances I cannot see how the defendant, Draper, can avoid the dilemma in which he is put by law. Either he did not keep a good look-out, in which case he was negligent, or if he did keep a good look-out then he failed to drive the car at such a speed or under such control as to enable him to avoid the plaintiff's body. There is no escape from the dilemma. I cannot see, upon this evidence—which counsel with their high sense of honour have agreed upon between themselves—how the county court judge can fail to find negligence against Draper." The case was sent back to the county court judge in order that he might go into the whole matter, with the direction that as a matter of law the defendant was in the dilemma that either he did not keep a proper look-out or he was going too fast to avoid that which his look-out showed him.

As my brother Charles has said in the course of the argument, Rowlatt and McCardie JJ., in laying down the law in that case, were not saying anything which was new. They were merely repeating again, as it has been repeated again and again since it was decided in the year 1809, the principle laid down in *Butterfield* v. *Forrester*.(1) The headnote of that case is as follows : "One who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction." In that case Bayley J. said (1) : "The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction ; so that the accident appeared to happen entirely from his own fault." Lord Ellenborough C.J. said (1) : "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

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(1) 11 East, 60.

Here, to my mind, it is perfectly clear, however wrongly and improperly the defendants acted in putting their steam lorry in the place where it was, the plaintiff might by the exercise of ordinary care have avoided the collision, and he must therefore have failed to exercise ordinary care, and, as a matter of law, was guilty of negligence, and such negligence should have been found as a matter of law on those facts by the county court judge. It is said, and I think rightly said, that the county court judge expressed the proposition of law perfectly accurately. He did. My trouble about it is that, expressing the law perfectly accurately, he obviously has not applied it. He knew what it was, but he has not applied it on these facts, and the evidence permitted him to find nothing else on these facts but that the plaintiff was guilty of contributory negligence.

For these reasons I think this appeal should be allowed.

(1) 11 East, 61.

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CHARLES J. I agree. I do not want to restate the facts that my brother Swift has already stated, but shortly the position presented to the county court judge was as follows: In a 14-foot roadway there was a Foden steam wagon unlighted standing 9 inches from its kerb, and that Foden wagon was 7 feet wide. It was a dark, wet night and there was a good deal of wind blowing. The plaintiff on his motor cycle came along the road towards that unlighted lorry. The lamp of the plaintiff's motor cycle was alight and would throw a beam 15 yards ahead, according to his own testimony. For some reason he failed to see this very large object, the Foden steam wagon, and he ran into it and sustained grievous hurt. It is said by Mr. Comyns Carr that this Court has no jurisdiction to interfere with a finding in those circumstances that the plaintiff was not guilty of contributory negligence, and therefore was entitled to recover damages in the action. The true position is that the evidence that was given is consistent only with negligence on the part of the plaintiff. If that proposition is put the other way, there was no evidence upon which a judgment could be founded that the plaintiff was not guilty of contributory negligence. This is a question which we can, and ought to, consider and is, in my opinion, within the jurisdiction of this Court. The county court judge enunciated the principles of law which he had to apply correctly, but when he came to apply them he did not, in my view, apply them correctly.

I agree that the appeal must be allowed.

Appeal allowed.
Judgment entered for defendants.

Solicitors for plaintiff: *Berry Tompkins & Co.*
Solicitors for defendants: *L. Bingham & Co.*

R. F. S.

BAKER *v.* E. LONGHURST AND SONS, LIMITED.

C. A.
1932
June 21.

Negligence—Highway, Unlighted Vehicle on at Night—Collision with Motor Cycle—Contributory Negligence of Motor Cyclist.

A horse and cart belonging to the defendants was going along a dark road at night on its proper side but without a light. There ran into it from behind a motor cycle ridden by the plaintiff, who was thereby injured and the motor cycle damaged. The plaintiff brought an action in the county court to recover damages. In cross-examination the plaintiff said that it was a straight road, that he had good brakes and could easily pull up in 10 yards, that the beam of his head lamp showed 30 yards, and that he had not applied his brakes. The defendants alleged that the accident was caused or contributed to by the negligence of the plaintiff. The county court judge held that the onus of proving contributory negligence lay on the defendants and that they had not discharged that onus, and he accordingly gave judgment for the plaintiff. The Divisional Court differed in opinion. On appeal by the defendants:—

Held, that the accident was due either to the fact that the plaintiff was going at a speed at which he could not stop within the limits of his vision, or that he was not keeping a proper look-out, and that in either case he was guilty of negligence, and was not entitled to recover.

Sharpe v. *Southern Ry.* [1925] 2 K. B. 311 applied and followed.

Appeal from a Divisional Court.

The plaintiff, Jack Langley Baker, brought an action in the Dorking County Court against the defendants, E. Longhurst & Sons, Ld., to recover 44*l.* 8*s.* 6*d.* damages for personal injuries, damage to his motor cycle, and other incidental expenses, caused by the negligent driving of a horse and cart by the defendants' servant on September 16, 1931, along Ashcombe Road, Dorking, in the county of Surrey. The negligence alleged was in not keeping a proper look-out and in not having front and rear lights on the cart, it being after lighting-up time and dark.

The accident took place about 8.25 p.m. on September 16, 1931, ten minutes after lighting-up time. The defendants' tip-cart and one horse was being driven along Ashcombe Road, Dorking, close to the kerb on its own side of the road, and it had no lamp. The plaintiff was riding his motor cycle and was travelling in the same direction as the cart, and was coming along behind the cart. The plaintiff drove

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his motor cycle into the back of the cart and he was injured and his motor cycle damaged. The plaintiff in his evidence said that he had an acetylene head lamp; that his speed was about 15 to 20 miles per hour; it was a very dark night; he did not actually see it was a cart, he saw a dark object loom up and swerved to avoid it. In cross-examination he said that it was a perfectly straight road; that he had good brakes and could easily pull up in 10 yards; that the beam of his lamp showed 30 yards; that he never applied his brakes at all, it was too late.

There were houses on each side of the road, and according to the plan there was an electric lamp in the road 20 yards beyond the scene of the accident and another lamp 60 yards before arriving at the scene of the accident. But there was no evidence whether or not the lamps were lighted at the time of the accident.

The defendants by their defence alleged that the accident was caused or contributed to by the negligence of the plaintiff in (inter alia) not keeping a proper look-out and driving at an improper speed.

The county court judge held that the onus of proving contributory negligence lay upon the defendants, and he found that they had not discharged that onus and satisfied him that the plaintiff was guilty of contributory negligence. He accordingly entered judgment for the plaintiff for 44*l.* 8*s.* 6*d.*

The defendants appealed to the Divisional Court, which were divided in opinion. Talbot J. thought that there was implicit in the judgment of the county court judge a finding of fact, which they could not disturb, that the plaintiff could not in the circumstances by the exercise of reasonable care have seen the unlighted cart which was just in front of him on the road in time to avoid collision with it, and that therefore the appeal ought to be dismissed, although he himself on the evidence would have come to a decision in favour of the defendants. Acton J. thought the case was indistinguishable from *Tart* v. *Chitty* (1), that he was bound by that decision and that therefore the appeal ought to be allowed. The appeal was accordingly dismissed.

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(1) Ante, p. 453.

The defendants appealed.

T. Eastham K.C. and *Armstrong-Jones* for the appellants. It is admitted that the defendants were negligent in having an unlighted cart on the highway after dark, but it is clear on the plaintiff's admissions that there was contributory negligence on his part, and on those admissions the county court judge ought to have entered judgment for the defendants. Lord Hatherley said in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1): "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact." That passage directly applies in the present case. There was no contest of fact. The county court judge ought on the admissions of the plaintiff to have been satisfied that he had been guilty of contributory negligence, as the evidence was all one way.

[SCRUTTON L.J. referred to *Sharpe* v. *Southern Ry.* (2)]

A case with very similar facts to those in the present case came before the Divisional Court in 1931—namely, *Tart* v. *Chitty* (3)—and there both Swift J. and Charles J. held that the plaintiff must have run into the unlighted lorry for one of two reasons, either he was not keeping a proper look-out, or if he were keeping a proper look-out he was travelling at such a speed that he was unable to stop his motor cycle or to swerve from the course he was pursuing in such a way as to avoid colliding with the obstruction in front of him, and that he must therefore have been guilty of negligence. Rowlatt J. and McCardie J. said substantially the same thing in *Page* v. *Richards & Draper*. (4) Either the defendant was not keeping a sufficient look-out, or he was going too fast for the look-out that could be kept, in either of which cases he was guilty of negligence. This is merely an application of the principles laid down in *Butterfield* v. *Forrester*. (1) In the present case, as the evidence with regard to the plaintiff's contributory negligence is all one way, the appeal should be allowed.

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(1) (1878) 3 App. Cas. 1155, 1169.

(2) [1925] 2 K. B. 311.

(3) Ante, p. 453.

(4) November 8, 1920, unreported.

L. R. Miller for the respondent. It was entirely a question for the county court judge whether what the plaintiff did was reasonable in the circumstances. The decision in *Tart* v. *Chitty* (2) was a decision on the particular facts of that case and did not bind the county court judge. The facts of that case are different from the facts of the present case in several respects. Talbot J. in the present case held that *Tart* v. *Chitty* (2) laid down no general principle of law which could be applied to the particular facts of other cases. Lord Watson in *Wakelin* v. *London and South Western Ry. Co.* (3) said that "the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour." The county court judge has held that the defendants had not satisfied him that the plaintiff was guilty of contributory negligence. Whether or not a person has been guilty of negligence is a question of fact, and the finding of the county court judge ought therefore to be conclusive.

SCRUTTON L.J. In this case there is an appeal from the decision of a county court judge in regard to a collision between a motor cyclist and a cart. There is no dispute that the owners of the cart were negligent, because they were driving after lighting-up time without a light. The question is whether the driver of the motor cycle was guilty of contributory negligence. The county court judge has, in his notes, said that the defendants had not satisfied him that the driver of the motor cycle was negligent. The appeal is on the ground that the facts were such that there is no room for any other finding than the one that the motor cyclist was negligent. That it is a case of some little doubt and difficulty is manifest in that the Divisional Court were divided in opinion. Acton J. was in favour of allowing the appeal on the ground that the evidence was all one way on the subject of contributory negligence, but Talbot J., thinking the case was very near the line, could not take the same view. Of course, the case is rendered a little more difficult by the fact that it is an appeal from a county court judge, from whose finding of fact there is no appeal. A county court judge must go wrong in law before his judgment can be interfered with, which involves the proposition that the appellants must satisfy us that, as a matter of law, the evidence was such that the finding that there was no contributory negligence could not stand.

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(1) (1809) 11 East, 60.

(2) Ante, p. 453.

(3) (1886) 12 App. Cas. 41, 47.

Now this is a class of case which is obviously very common, because Mr. Eastham has read to us the judgments of Divisional Courts in two similar cases to the present where the Divisional Courts decided against the motor cyclists, and this Court has had two more cases in the last few years on almost exactly the same sort of facts: one of a stationary vehicle in a dark road at Winchester, where a motor cyclist ran into a very large motor lorry; and another, a case which had this slightly different feature, that the lorry driver, desiring to get water, had pulled over to the wrong side of the road to get at a stream, and so was run into by the motor cyclist. (1) Now every case must depend upon its own facts,

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(1) In *Evans* v. *Downer & Co., Ld.*, which was heard before the Court of Appeal on July 20 and 21, 1933, a lorry proceeding from Basingstoke to Winchester at night time pulled up at a refreshment hut and stopped on the wrong side of the road. There was a conflict of evidence whether the lorry had a rear light. The moon was shining, but the lorry was standing in the shadow. Another lorry was stopping in a parking place opposite the refreshment hut, and it was so placed that its lamps threw a beam of light across the road. A third lorry, also proceeding from Basingstoke to Winchester, ran into the stationary lorry. The driver of the moving lorry said that he was prevented from seeing the stationary lorry owing to the beam of light thrown across the road by the lorry in the parking place. The jury accepted his evidence and found a verdict for the owner of the moving lorry.

SCRUTTON L.J. said that in the peculiar circumstances of this case and therefore it is not much good citing the fact that in another case a certain conclusion has been arrived at by different judges. The question of law we have had brought to our attention in the arguments. In *Sharpe* v. *Southern Ry.* (1) the headnote says : "The plaintiff was a passenger on the defendants' railway to G[uildford] by a train which arrived at that station while it was still daylight. Owing to the train being too long for the platform at Guildford, upon its arrival there the hindmost carriage, in which the plaintiff was, stopped short of the platform. A porter shouted to the passengers to keep their seats, but the plaintiff, who was asleep, did not hear him. On waking the plaintiff realized that he was at Guildford station, and, fearing that he might be carried on, got out in a hurry without looking to see what he was stepping on. There being a drop of five feet from the carriage floor to the ground, he fell and was injured." The jury found that he was not negligent, and this Court set the verdict aside on the ground that, on the facts as stated, he was clearly guilty of negligence in getting out and not looking where he was going. If he had looked he would have seen that there was no platform, and that the nearest solid ground was five feet below him. He did not look, and he got out as if he was getting on to a platform, and fell and broke his leg. Bankes L.J., Atkin L.J. and I gave judgment, and I see in Atkin L.J.'s judgment this statement (2) : "The plaintiff in his own evidence conclusively proves that, even if the defendants were negligent, their negligence was not the cause of the accident, but that it was brought about by his own lack of care in not looking to see where he was going."

there was just enough evidence to support the jury's verdict. This Court had said three times, but unfortunately no one had reported those cases, that if the driver of a vehicle proceeded at such a speed that he could not pull up within the limits of his vision he was in the wrong. If a driver could not see where he was going he must stop. That principle had been applied three times by this Court, and their decision in the present case did not weaken the force of those earlier decisions.

GREER and SLESSER L.JJ. agreed.

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(1) [1925] 2 K. B. 311.

(2) Ibid. 319.

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That merely goes back to the statement of Lord Hatherley in *Slattery's* case (1): "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

Now the facts in this case are these: Just after lighting-up time a horse and tip-cart were going along a dark road in Dorking. When I say "a dark road," there was an electric light within 20 yards of the accident ahead and one within 60 yards of the accident behind. But still the evidence was that it was very dark. As the cart was going along on its proper side of the road without a light there ran into it from behind a motor cycle. The evidence of the driver of the motor cycle was this: "At the pace I was going, which I say was 15 to 20 miles an hour, I can pull up in 10 yards. I have an acetylene lamp, which will show 30 yards ahead. I was not able to avoid the cart because I was too late." On that evidence, which is not contradicted in any way—it is the evidence of the plaintiff himself—he was in this difficulty: either he was going at a pace at which he could not stop within the limits of his vision, or, if he could stop within the limits of his vision, he was not looking out. In either event he was guilty of negligence. That is merely carrying out the principles on which we acted in *Sharpe* v. *Southern Ry.* (2), and on which we acted in the two cases to which I have referred, and which were acted upon by the Divisional Courts in the two cases the judgments of which Mr. Eastham has read. It will be noted that apart from *Sharpe's* case, which is, of course, a different case, there have been five cases of motor cyclists running into things from behind. I suppose anybody who knows anything about the roads knows that a motor cycle is one of the fastest vehicles on the road, and if people who ride motor cycles will go at such a pace that they cannot pull up when they see some obstruction in front of them, they must take the consequences and not be able to recover damages for the injury they sustain through their own foolishness or negligence. It is no good saying that this cart had not a light. The collision might have been with a foot passenger in the road, who is not obliged to carry a light, or the accident might have taken place in the New Forest where cattle frequently cross the road, and they again are not obliged to carry lights. If a person rides in the dark he must ride at such a pace that he can pull up within the limits of his vision, and if, in those circumstances, he strikes something, either he is going too fast or he has not been keeping a proper look-out.

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(1) 3 App. Cas. 1155, 1169.

(2) [1925] 2 K. B. 311.

It is clear in this case that the county court judge had no grounds upon which he could decline to find that the plaintiff was guilty of contributory negligence.

The appeal must, therefore, be allowed, and judgment entered for the defendants with costs here and below.

LAWRENCE L.J. I agree. The evidence given in this case by the plaintiff is consistent only with negligence on his part. Putting it into other words, there is no evidence upon which a judgment could be founded that the plaintiff was not guilty of contributory negligence. The appeal must be allowed.

GREER L.J. I agree. The question whether a judge is ever entitled to enter judgment for the defendants on the ground that, by the plaintiff's own admissions or by the undisputed facts, contributory negligence is conclusively proved, has been a moot question on which differences of opinion have been expressed by very high authorities. But it is now settled beyond question that there may be circumstances in which, though the onus be on the defendants to prove the contributory negligence, the judge may at the end of the case, say, upon the admissions of the plaintiff's own witnesses or upon the undisputed facts of the case, that contributory negligence was so proved that no jury, acting reasonably, could possibly find any other verdict except that the accident was due to the contributory negligence of the plaintiff. That was finally determined, at any rate so far as this Court is concerned, in the case, to which my Lord has referred, of *Sharpe* v. *Southern Ry.* (1) That is the only matter of law which we have to consider in this case. The other question is whether or not on the facts admitted by the plaintiff there was conclusive evidence of contributory negligence. This is what the plaintiff said: "Driving from Ranmore Road to London Road along Ashcombe Road. Proper lights. Acetylene head-lamp. Speed about 15 to 20 miles per hour. It was a very dark night. I did not actually see it was a cart. Saw a dark object loom up and swerved to avoid it." Then in cross-examination he admitted: "I could pull up easily in 10 yards. Beam of my lamp shows 30 yards. I never applied my brake at all. It was too late." The meaning of that is that with the beam of his light showing 30 yards, if he was keeping a look-out he could have seen that there was some object with regard to which he had to exercise the care due from a reasonable driver to avoid doing damage to that object, or to himself, and, as my Lord has pointed out, if he did see it 30 yards away, then it is obvious that if he had taken reasonable care in driving, and slowed down or stopped, or tried to avoid the obstacle in front by swerving to the right in time, he could have avoided the accident, but the fact that he did not do so indicates that he was driving so fast that he could not exercise his judgment in time to swerve or to put his brakes on in time. If so, he was guilty of negligence. On the other hand, it may be that he was not keeping a good look-out, and therefore, if he saw the object at some time, he did not see it as soon as he ought to have seen it, or would have seen it, if he had been keeping a proper look-out. There is no escape from that dilemma, and in my judgment the plaintiff himself conclusively proved that the accident would not have happened if he had acted with reasonable care.

For these reasons I think the learned judge ought to have entered judgment for the defendants. There was no jury in this case, but there would have been exactly the same

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(1) [1925] 2 K. B. 311.

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result if there had been a jury. It was the judge's duty to enter judgment for the defendants.

For these reasons I think the appeal should be allowed and in the terms my Lord has stated.

Appeal allowed.
Judgment entered for defendants.

Solicitors for appellants: *L. Bingham & Co.*

Solicitors for respondent: *Rising & Ravenscroft, for Triggs Turner & Co., Guildford.*

R. F. S.

1933
May 25.

FIRST MORTGAGE CO-OPERATIVE INVESTMENT TRUST, LIMITED AND OTHERS v. CHIEF REGISTRAR OF FRIENDLY SOCIETIES.

Industrial and Provident Society—Right of Member to inspect Books—" Books containing the names of the members "—No right to inspect Addresses—Industrial and Provident Societies Act, 1893 (56 *&* 57 *Vict. c.* 39), *s.* 17.

By s. 17 of the Industrial and Provident Societies Act, 1893:—

Sub-s. 1: " Save as provided by this Act, no member or person shall have any right to inspect the books of a registered society, notwithstanding anything in the existing rules relating to such inspection."

Sub-s. 2: " Any member or person having an interest in the funds of a registered society shall be allowed to inspect his own account and the books containing the names of the members at all reasonable hours . . . ."

A member of a registered society on October 28, 1932, demanded to see the books containing the names of the members. At that time the only book containing the names of the members was a register containing, in addition to the names, the addresses and particulars of the share holdings of the members. This register was produced, open at the page containing the member's own account, but he was not allowed, as he claimed the right to do, to copy the names and addresses of the other members.

Ultimately the society undertook to allow him to inspect the books containing the names of the members, and on January 2, 1933, books prepared for the purpose, containing only a complete list of the names of the members without addresses or other particulars, were produced to him. Production of the register which he saw on October 28, and which was still in existence, was refused.

On summonses against the society for refusing to allow the member on October 28, 1932, and again on January 2, 1933, to inspect the books containing the names of the members, and against a director and the secretary of the society for aiding and abetting the commission of the second offence, the magistrate held that inspection of the register ought to have been given, and that the books produced on January 2, 1933, were fabricated for the express purpose of defeating the member's rights:—

Held, by the Divisional Court, that the words "the books containing the names of the members" could not be construed as "the books containing the names and addresses of the members." The member was not entitled to see the register, and the books produced on January 2, 1933, were not fabricated, but were properly prepared for the purpose of complying with s. 17 of the Act.

CASE stated by a Metropolitan magistrate.

Informations were preferred at Marlborough Street police court, on behalf of the Chief Registrar of Friendly Societies, alleging: (*a*) that on October 28, 1932, the First Mortgage Co-operative Investment Trust, Ld. (the appellant society), a society registered under the Industrial and Provident Societies Acts, 1893 to 1928, unlawfully failed to allow Carey L. Burnett, a member of the appellant society, to inspect at all reasonable hours the books containing the names of the members, as required by s. 17 of the Industrial and Provident Societies Act, 1893 (1); (*b*) that on January 2,

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(1) By the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 10, sub-s. 1, it was provided: "With respect to the duties and obligations of registered societies the following provisions shall have effect: (1.) Every society shall . . . . (*e*) Allow any member or person having an interest in the funds of the society to inspect the books and the names of the members at all reasonable hours . . . . except that no such member or person, unless he be an officer of the society, or be specially authorized by a resolution thereof, shall have the right to inspect a loan or deposit account of any other member without the written consent of such member."

That Act was repealed by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), which provides by s. 17:—

Sub-s. 1: "Save as provided by this Act, no member or person shall have any right to inspect the books of a registered society, notwithstanding anything in the existing rules relating to such inspection."

Sub-s. 2: "Any member or person having an interest in the funds of a registered society shall be allowed to inspect his own account and the books containing the names of the members at all reasonable hours at the registered office of the society. . . . ."

Sub-s. 3: "A registered society may, by any rules registered after this Act is passed, authorize the inspection of any of its books therein

1933, the appellant society was guilty of a similar offence; and that on that date the other appellants, Lord Teynham and Geoffrey H. Crispin, who were respectively a director and the secretary of the appellant society, aided and abetted the society in the commission of that offence.

Mr. Burnett was a member of and shareholder in the appellant society. On October 28, 1932, he called by appointment at the registered office of the society, and asked to see the register of members of the appellant society and to copy 100 names and addresses. In the absence of the secretary, the assistant secretary showed Mr. Burnett a book described on the cover as the register of members, containing the names and addresses of the members together with full details of the shares held or transferred by them and of loans made on the security of the shares. The book was open at the page containing Mr. Burnett's own account, but the assistant secretary refused to allow him to copy the names and addresses of other members.

As a result of further correspondence, an undertaking was given on behalf of the appellant society that Mr. Burnett should be allowed to inspect and take copies of the books containing the names of the members, and he again called at the office on January 2, 1933.

The secretary produced two books containing only the names, without the addresses, of all the members of the society. These books had, admittedly, been prepared ad hoc since October 28, 1932. Mr. Crispin was willing to allow Mr. Burnett to copy these books, but Mr. Burnett demanded

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mentioned, in addition to the said books containing the names of members, under such conditions as are thereby imposed, so that no person, unless he be an officer of the society, or be specially authorized by a resolution thereof, shall have the right to inspect the loan or deposit account of any other member without his written consent."

It is an offence under s. 62, sub-s. 1, of the Act of 1893, as amended by s. 10 (*a*) of the Industrial and Provident Societies (Amendment) Act, 1913 (3 & 4 Geo. 5, c. 31), if "a registered society, or an officer or member thereof, or any other person, fails to . . . . allow to be done anything which the society, officer, or member, or person is by this Act required to . . . . allow to be done."

to see the register of members which had been produced on October 28, 1932, and which was still in existence. Mr. Crispin refused to produce it on the ground that the directors had decided that Mr. Burnett was only to be given the names. This refusal was confirmed by Lord Teynham later in the same interview.

The appellants contended that on the express words of s. 17 of the Act of 1893 (which deliberately curtailed the right of inspection which formerly existed under s. 10 of the Act of 1876) a member was only entitled to inspect—which they conceded would include the right to take copies—the names of the members, either in the books produced on January 2, or in the register, with all other entries covered up.

The respondent contended that the right given by s. 17, if it was not to be wholly illusory, must include a right to inspect every book containing the names of the members, whether or not it contained addresses or other information, and that the appellants would only have been entitled to withhold or cover up the loan and deposit accounts, disclosure of which was prohibited under sub-s. 3 of s. 17.

The magistrate was of opinion that the appellant society was under an obligation to allow a member to search all books containing the names of the members and to take copies of their addresses if they were entered therein. He was of opinion that the books produced on January 2 were fabricated for the express purpose of defeating the legitimate object of the member. He convicted the appellants on all the informations, and imposed fines.

Stuart Bevan K.C., *Fortune* and *G. C. Lynn* for the appellants. The right of inspection given to members of an industrial or provident society by s. 10, sub-s. 1, of the Act of 1876 was deliberately cut down by s. 17 of the Act of 1893. There is no longer a right to inspect " the books and the names of the members " ; the right is now to inspect " his own account and the books containing the names of the members." Neither Act mentions addresses. The right, moreover, to inspect " the books containing the names of the members" cannot mean "all the books containing the names of the members for any purpose," for that would throw open the very books which sub-s. 3 of s. 17 says are not to be open. This reading of the section is confirmed by the consideration of s. 18, whereby the Registrar, on the application of ten members, may appoint an accountant or actuary "to inspect the books of the society and to report thereon." The general inspection purposely withheld from the individual member is given to an expert appointed by the Registrar when he is satisfied that a responsible body of opinion requires such an inspection. Sect. 34, again, expressly refers to "names, addresses and occupations," which suggests that the omission of addresses in s. 17 was intentional.

To the suggestion that a right to inspect names only is illusory, it may be replied that there is an annual meeting at which members can meet and associate themselves with any application to the Registrar under s. 18 or s. 50 of the Act. But even if the magistrate was right in thinking such an inspection useless, that is due to the language of the statute. It may afford ground for amending the section, but not for stretching the language of it.

It is admitted that the right to inspect includes the right to take copies of any books to which the right extends.

Even in the triennial return to the Registrar under s. 4 of the Act of 1913, no addresses are called for.

[*The Attorney-General.* That is purely for statistical purposes.]

The relation of a provident society to its members is very much akin to that of a banker to his customers. The member becomes a shareholder, and on the security of his shares he obtains a loan from the society, just as the ordinary customer of a bank gets a loan from the bank on security, the difference being that in the provident society the loan is on the security of its own shares. Hence an inquirer, if he were not restricted, as he is by s. 17, would learn a great deal about the financial position of his fellow-members. The language of s. 17 is deliberately narrow, and it is submitted that "names" means names and nothing else. It does not mean that a member may inspect every book in which the names of the members incidentally occur. There can hardly be any book of such a society which does not contain, alphabetically or otherwise, the names of the members.

[HUMPHREYS J. If the only book containing the names of the members contains other particulars (not being those excluded by sub-s. 3), is the member not entitled to inspect it?]

Not unless the other particulars are covered up.

[AVORY J. You say that the Act of 1893 has imposed a new limitation—the member may inspect his own account. If he may inspect all books containing the names of the members, he may thereby inspect other members' accounts.]

That is the main objection to extending the terms of the section. If addresses were given there is no means of controlling the use made of them.

Sir Thomas Inskip A.-G. and *Wilfrid Lewis* for the respondent. This is a bare point, on which there is no authority, on the meaning of the words "books containing the names of the members." The plain intention is to permit a degree of knowledge to any member which will enable him to take any action with reference to the society's affairs which may be proper. It is difficult to see what was the object of withholding addresses unless to prevent this member from having information which would make his right of use. It must have been the intention to give any member the names and addresses of his fellow-members so that he may communicate with them with a view to some joint action—which may be action wholly agreeable to the directors, or adverse to them. It may, and almost certainly will, be wholly illusory to give names without addresses. This Act applies to Scotland and Wales. There are parts of Scotland where nearly every one is a Macgregor or a Campbell. To tell a member in Argyllshire that a dozen fellow-members are called Campbell will tell him no more than to give a Welshman a list of John Joneses.

It is suggested by Mr. Bevan that s. 18 affords a remedy. Supposing a member is minded to put s. 18 in operation, he must get nine others to associate with him. Unless he happens to have nine members among his friends, or to find them at the annual meeting, he cannot get them unless he has access to the addresses.

[Lord Hewart C.J. He might do it by advertisement.]

Sect. 17 should be read as meaning, "the books containing the names and addresses of the members, if the books do contain those names and addresses." Here the society had a book containing the names and addresses. On the first occasion, it was the only book; on the second occasion it was in existence and also the book containing only the names. The register may have contained other information, the disclosure of which is forbidden under sub-s. 3, but it was a book containing the names of the members, and there was nothing to forbid him to look at the addresses. One would not expect that to be forbidden, having regard to the plain intention of Parliament.

[Avory J. You must say that a member may inspect any book containing the names of the members. Where do you find any right to cover up entries? The very book which was in question in October was the book containing the accounts which he is forbidden to see.]

The charges on shares which that book showed are quite different from the loan or deposit account of a member, which is defined in Sch. II. of the Act. It is precisely what a member who may be contemplating the acquisition of a fellow-member's shares will require to know—namely, whether they are charged in any way.

[Lord Hewart C.J. If the Act means "names and addresses" it would have been very easy to say so. Both Acts are silent as to addresses.]

It may have been assumed that the books containing the names would contain the addresses.

Bevan K.C. replied.

Lord Hewart C.J. In spite of the forcible argument of the Attorney-General, I, with all due respect to the learned magistrate, have come to the conclusion that this appeal ought to be allowed.

The essence of the matter is thus expressed in the contentions of the respondent: "That upon the true construction of the provisions of the Industrial and Provident Societies Acts, 1893 to 1913, and/or of the registered rules of the appellant society the expression 'the books containing the names of the members' meant all the books of the society in existence containing the names of the members whether or not such books contained also the addresses of the members; which books included the register or list of members produced to the said Burnett on October 28, 1932." So it was argued before the magistrate and so the magistrate held.

It seems to me important to remember that this is a penal section, and it begins with a negative: "Save as provided by this Act, no member or person shall have any right to inspect the books of a registered society, notwithstanding anything in the existing rules relating to such inspection." Then it goes on to provide by sub-s. 2: "Any member or person having an interest in the funds of a registered society shall be allowed to inspect his own account and the books containing the names of the members at all reasonable hours," etc. I cannot think that "the names of the members" means the names and addresses of the members. If Parliament had meant to say that it would have been very easy to say so, and when one turns to s. 34, there is a clear enumeration of "the names, addresses, and occupations of the members." I think that this section must be construed strictly, and that we ought not, as this section is framed, to say that "names" means names and addresses.

I think, therefore, that this appeal ought to succeed.

AVORY J. I am of the same opinion. There were two informations in this case; the first charged that: "On October 28, 1932, the appellants unlawfully failed to allow Carey L. Burnett, a member of the appellant society, to inspect at all reasonable times the books containing the names of the members as required by s. 17 of the Industrial and Provident Societies Act, 1893." The second information alleged a similar offence on January 2, 1933.

The statement of facts says that on October 28, 1932, Mr. Burnett visited the office. A book was open upon the table which was described on the cover as the Register of Members, and it, in fact, contained the names and addresses of the members of the society, the number and amount of the shares of the members, the number of shares transferred, the loans made on the security of the shares of the society, and all other details relating to each shareholding in the appellant society. That book was the only book containing the names and addresses of the members which was then in existence. On Mr. Burnett proposing to take a copy of 100 of those names and addresses he was refused permission to do so. After some correspondence an undertaking was given by the appellant society that he would be allowed to inspect and take copies of the books containing the names of the members—that means only the names of the members. On January 2, 1933, the opportunity was given to him to inspect and take copies from two books, which were then produced, containing a complete list of the names of the members without their addresses. It is admitted that those books had been compiled since October 28, 1932. Therefore, it appeared that this member of the society, both in October and in January, did have the opportunity of inspecting the names of the members, limited to the names without the addresses. The question then, and the only question, is whether there has been any breach of s. 17 of the Act of 1893. I think that in order to appreciate that section it is necessary to consider the terms of the previous Act of 1876. [His Lordship read s. 10 of the Industrial and Provident Societies Act, 1876.] It is obvious that under that Act any member of the society having an interest in the funds was allowed, and the society was compelled to allow him, to inspect all the books without limitation and if, in fact, there happened to be, apart from the books, a list of the names of the members he was entitled also to inspect that: he was entitled to inspect all the books and the names of the members. When one comes to the Act of 1893, one finds an express limitation imposed by Parliament upon that right to inspection. The section begins: "Save as provided by this Act, no member or person shall have any right to inspect the books of a registered society, notwithstanding anything in the existing rules." What is the only exception to that? If it is that a member having an interest in the funds shall be allowed to inspect the books which contain not only the names but the addresses of the members, and which contain the accounts or some of the accounts of the members, there could be no possible reason in putting into the section liberty to him to inspect his own account, because he would find his own account in the books with the other accounts.

I think, therefore, that this section must be, as my Lord has said, read strictly, and, in my view, sub-s. 3 also confirms the view that the member's right to inspection and copying is limited to books which contain the names only of the members, because it provides that the society itself may by rules authorize the inspection of any of its books which are mentioned in the rules, provided that no person, unless he be an officer of the society or specially authorized, shall have the right to inspect the loan or deposit account of any other member. It seems to me that that right which is given to the society to make rules for allowing the inspection of any of its books confirms the view that if no such rules are made, the members' right is limited to an inspection of books which contain only the names of the members.

I only wish to add that I do not myself see any justification for the view of the learned magistrate that the books which were produced on January 2, 1933, had been fabricated for the express purpose of defeating the legitimate object of the member. It appears to me that those books were properly prepared, not fabricated, but compiled for the express purpose of complying with this section of the Act of Parliament, seeing that in October, 1932, they had no book at all which could strictly comply with it—namely, a book containing only a list of the names of the members.

I agree, therefore, that this decision of the learned magistrate was erroneous.

HUMPHREYS J. I also agree that this appeal should succeed.

If I considered myself at liberty to decide this case upon what I believe the intention of Parliament to have been in 1893, I should have been very much disposed to accept the argument of the Attorney-General, because I can find no answer to the question which was put early in the argument, and to which Mr. Stuart Bevan has not been able to find any answer—namely, the question what can be the purpose of allowing members of a society or persons interested in a society to have a list of the names of the members of the society, unless there is some means of identifying those members either by their addresses or in some other way. It seems to me that the provision that the society is bound to allow the names to be disclosed is quite illusory. It is useless to any person to know that there are twenty-five people who are named John Brown who are members of the society, unless that person has some means of identifying them. I cannot help thinking that it is extremely likely that the reason why Parliament in s. 17 used the expression "the books containing the names of the members" without referring to any means of identification, was only that in the previous Act of Parliament of 1876, which was then being repealed, very similar words had, in fact, been used in the section, the place of which was being taken by s. 17. It was quite reasonable at that time that members should be referred to without addresses, because by s. 10 of that Act it was quite clear that any person was entitled to see the books which would give him the addresses of the members. So that in 1876 every member, being, in accordance with the desire of Parliament, allowed to know the names of his fellow-members, had the opportunity of obtaining their addresses as well. I find it very difficult to imagine for what possible reason Parliament, in altering the law in some other respect, further altered the law in providing that any person interested in the society should be entitled to have the names, but not the addresses, of his fellow-members. I am not at liberty to construe the section in that way unless I find some words which can reasonably be so construed, and, as the other members of the Court have already observed, this is a penal section, and, therefore, must be construed strictly. I confess that I myself should be disposed to go a long way in the direction of holding that "names" necessarily include addresses where names are given for the purpose of identifying the other members of the society, but the Attorney-General has said that that would clearly not be sufficient for his purpose. The only construction of this section which would satisfy the prosecutor in this case would be to hold that under s. 17 an offence was committed unless not only the names and addresses but also all the particulars (save only those expressly protected by sub-s. 3) to be found in all the books which contained the names of the members were given. That I find too much. I cannot read the words "shall be allowed to inspect the books containing the names of the members" as meaning that those particulars are all to be given to any person who is interested in the funds of the society.

Therefore, although, at all events in my opinion, the decision which this Court is giving will have the effect of rendering this permission quite useless to any person who desires to identify his fellow-members, I think that if it is to be altered it must be altered by Parliament.

I agree with the judgment of the other members of the Court that upon s. 17 as it stands it is wrong to say, as the learned magistrate has said, that the person who asks for the inspection is entitled to see every book in which the names of the members happen to be stated, and is entitled to see all the information in those books with the exception of those matters which are specifically mentioned in the Act as being matters which are not to be disclosed.

I agree therefore that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Ralph C. Leach, Sims & Co.*
Solicitor for respondent: *Treasury Solicitor.*

J. W. H.

1933
May 15.

THE KING *v.* WESTMINSTER ASSESSMENT COMMITTEE.

Ex parte BLACK.

Rates and Rating—Metropolis—Valuation—Provisional List—Alteration of Entries—Power of Assessment Committee in absence of Objection—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 47, *sub-ss.* 1, 7.

Under sub-s. 7 of s. 47 of the Valuation (Metropolis) Act, 1869, an assessment committee has power to alter entries in the provisional list, even where no objection has been made to those entries.

Royal Agricultural Hall Co. v. *Islington Assessment Committee* [1918] A. C. 525 applied.

ORDER NISI for a certiorari.

In affidavits filed in the proceedings it was stated that the applicant, Robert Wilson Black, was the owner of the premises, No. 70 Duke Street, Westminster, a part of which consisted of flats. Formerly, Nos. 3 and 4 Duke Street Mansions (part of 70 Duke Street), were let to and occupied as a double flat by one tenant. That double flat was then rated at 240*l.* gross and 197*l.* rateable value. When that tenancy came to an end, Mr. Black reconverted the double flat into two flats and let them to two separate tenants. Under the tenancies, Mr. Black was liable for the rates. In October, 1932, Mr. Black received from the clerk to the Westminster Assessment Committee a notice under s. 47 of the Valuation (Metropolis) Act, 1869 (1), that the Westminster

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(1) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 47: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:

(1.) The overseers of the parish in which such hereditament is situate may . . . . . . send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament.

. . . .

(3.) On the receipt of the list the clerk of the assessment committee shall serve on the surveyor of taxes for the district a copy of the list, and shall serve on the occupier of any hereditament to which the list relates a copy of so much thereof as relates to that hereditament . . . . accompanied by a notice specifying a day

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Rating Authority had sent in a provisional list which included Nos. 3 and 4 Duke Street Mansions. That list showed No. 3 to be rated at 169*l.* gross and 137*l.* rateable value, and No. 4 at 146*l.* and 118*l.* rateable value.

Mr. Black, pursuant to s. 47, sub-s. 4, of the Valuation (Metropolis) Act, 1869, gave notice of objection to the provisional list in so far as it related to No. 3 Duke Street Mansions, but he gave no notice of objection in respect of No. 4 Duke Street Mansions.

At the hearing of the objection on November 30, 1932, Mr. Black's representative gave particulars of the accommodation of Nos. 3 and 4 Duke Street Mansions and stated his objections to the amount of the gross value proposed for No. 3.

. . . . on or before which any objection to the provisional list may be made . . . .

(4.) An objection may be made to any such provisional list by the said occupier . . . . by notice thereof in writing being served on the clerk of the assessment committee, on the overseers, on the surveyor of taxes, and on the occupier, or on such of them as the case may require.

. . . .

(7.) If no objection is made, then on the expiration of the time for making objections, or if an objection is made then as soon as the assessment committee have determined on the objection, the assessment committee shall cause a copy to be made of the provisional list, with any alteration made in it by the committee, and shall return the list and the copy thereof, after being dated and signed by their clerk, to the overseers.

(8.) A provisional list . . . . shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force.

. . . .

(10.) A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force and the proportion of the current rate charged as before provided in this section, shall be levied accordingly; but if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed."

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The valuer to the rating authority informed the assessment committee that it appeared that an error had been made in the provisional list, and that the gross and rateable values of No. 3 Duke Street Mansions had apparently been inserted for No. 4 and the values of No. 4 had been inserted for No. 3. The valuer asked the assessment committee to alter the list by transposing the values, but the assessment committee decided to adjourn the hearing so that the particulars of the two flats could be verified.

At the hearing on December 14, 1932, the valuer made recommendations which were accepted by the committee, and No. 3 Duke Street Mansions was assessed at 146*l.* gross and 118*l.* rateable value, and No. 4 at 169*l.* gross and 137*l.* rateable value, and the list was altered accordingly.

The order nisi for certiorari was obtained at the instance of Mr. R. W. Black to quash the decision of the Westminster Assessment Committee dated December 14, 1932, whereby the gross value of No. 4 Duke Street Mansions was increased from 146*l.* to 169*l.* The grounds of the order were, that:

(*a*) no objection had been made by Mr. R. W. Black to the provisional list in so far as it related to No. 4 Duke Street Mansions;

(*b*) no notice had been served on Mr. R. W. Black that the assessment committee intended to consider the list in so far as it related to No. 4 Duke Street Mansions;

(*c*) no opportunity had been given to Mr. R. W. Black by the assessment committee to place his case before them with reference to an alteration in the list in so far as it related to No. 4;

(*d*) the assessment committee had no authority to alter the value inserted in the list by the rating authority, unless an objection had been made to that value; alternatively,

(*e*) the assessment committee had no authority to alter the value inserted in the list by the rating authority, unless they first had given notice to the occupier that they intended to consider such value and/or unless they had first given the occupier an opportunity to present his case.

Montgomery K.C. and *A. M. Trustram Eve* showing cause against the order. There are no grounds for quashing the decision of the assessment committee. The question arises under s. 47 of the Valuation (Metropolis) Act, 1869, which deals with provisional lists. It is admitted that the applicant had made no objection in respect of the assessment of No. 4 Duke Street Mansions, and that no notice of the intention of the assessment committee to consider that assessment had been given to the applicant. But in making the alteration which they did in the assessment of No. 4 the assessment committee were acting within their powers under sub-s. 7 of s. 47 of the Act of 1869. Under that sub-section an alteration in the provisional list can be made even if no objection has been made to it. If no objection is made to the list, then, on the expiration of the time for making objections, the assessment committee shall cause a copy of the provisional list, with any alteration made by the assessment committee, to be sent to the rating authority, who will give effect to the alteration : see sub-s. 7. Sub-s. 10 of s. 47 provides for the rectification, in due course, of any alteration, whether made in the absence of an objection or as the result of an objection. Sect. 47 contains no provision for an appeal against a decision of the assessment committee, altering the provisional list, nor does it contain any provision for a notice to be given to the occupier of an intention to alter the provisional list. But when the provisional list eventually merges in the supplemental list a right of appeal accrues under sub-s. 10 of s. 47, and in the event of the appeal being successful, any order made on it would be antedated to the date when the provisional list became effective. In this case the assessment committee accepted the objection in respect of the assessment of No. 3 Duke Street Mansions, and altered the entry in the provisional list in respect of that flat. With regard to No. 4 the assessment committee's case was that the alteration of the entry in respect of that flat was made because the valuer reported that a mistake had been made and that No. 4 was a larger flat than No. 3, and was assessed at too low a value.

They were acting within their power in making the alteration.

In *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1) it was argued that the assessment committee had no power to make any alteration in the provisional list, except when an objection had been made. But that argument was rejected by the House of Lords. That decision is an authority for the construction put on sub-s. 7 by the assessment committee in this case.

Sir Walter Greaves-Lord K.C. and *H. J. Astell Burt* supporting the order. If the true meaning of sub-s. 7 of s. 47 of the Act of 1869 is that the assessment committee can increase the figures entered in the provisional list without any objection having been made, the effect of that would be to take away all the provisions of the section dealing with the occupier's right of objection. If the contention put forward on behalf of the assessment committee is right, a rating authority can send a provisional list to the assessment committee with such low values that the occupiers would be tempted not to give notice of objection. The assessment committee might then raise the values, and thus the occupiers would have no opportunity of objecting. Sub-s. 7 of s. 47 is imperfectly drafted and should apply only to cases where, in fact, objection has been made to the list. Sub-ss. 3 and 4 of the section contemplate that the occupier shall have notice of any proposed alteration and shall have the right to object. The case of *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1) is distinguishable. In that case objection had in fact been made to the provisional list. The dicta relied on in that case are obiter. Moreover, the question of jurisdiction was raised. Here the statute expressly states that there shall be a right of objection, and that right cannot be taken away except by clear words. Some force must be given to the words in sub-s. 6 that an objection shall be dealt with as if it were an objection to a valuation list: see *London County Council* v. *Islington Assessment Committee.* (2) The whole scheme of the Act is

(1) [1918] A. C. 525, 528.

(2) [1915] A. C. 762.

defeated if the assessment committee can alter values in a provisional list without giving interested parties an opportunity of objecting.

LORD HEWART C.J. I have come to the conclusion that, in spite of the praiseworthy argument of Sir Walter Greaves-Lord, this rule nisi for certiorari ought to be discharged. The important matters are contained in paras. (*d*) and (*e*) of the rule, which it is not necessary to read, and it seems to me that not only on the words of sub-s. 7 of s. 47 of the Valuation (Metropolis) Act, 1869, but even more on the decision of the House of Lords in *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1), it is not necessary that in order that an alteration may be made and be effective, there must first be an objection. It would be odd if this sub-section should mean that, beginning as it does with the words, "If no objection is made." I think, therefore, this rule ought to be discharged.

AVORY J. I have reluctantly come to the same conclusion. I should have been disposed, unaided by the opinions expressed in the House of Lords in *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1), to say that sub-ss. 3 and 4 of s. 47 of the Valuation (Metropolis) Act, 1869, clearly contemplated that the occupier of the hereditament should have the opportunity afforded him of making an objection, before the assessment committee could properly make an alteration in the list; and, but for the fact that Mr. Ryde in *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1) distinctly took the point on the construction of sub-s. 7, I should have said that it was on the face of it capable of that construction and that it was only upon an objection that the assessment committee could make the alteration, and if they have made it upon an objection, they are to return the list, and, so far as there has been no objection, they are to return the list; but that is quite consistent with the view that somebody ought to have had an opportunity of making the objection.

(1) [1918] A. C. 525, 528.

Mr. Ryde's argument in *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1) was as follows: "Sub-s. 7 deals with both cases, namely, where an objection is made and where no objection is made, but the words, 'with any alteration made in it by the committee,' do not by implication confer upon the committee a general power to alter the provisional list, but refer to the case where an objection has been made"; and, in dealing with that point, Lord Finlay said (2): "The initial words fix the time at which the committee are to discharge the duty imposed by the later words of the sub-section; it is to be discharged on the expiration of the time for making objections, or as soon as the committee have determined on any objections made. The committee are then to make a copy of the provisional list showing any alterations they have made in it, and to return the list, together with the copy, to the overseers. The power to make alterations is general." Lord Parmoor dealt with that same point in express terms when he said (3) that he was unable to assent to the argument of Mr. Ryde that the assessment committee had no power to alter the provisional list where no objection to it had been made. He went on to say: "It appears to me that this power has been expressly conferred upon them, and that the structure of the whole section is consistent only with the construction that the assessment committee have been constituted the tribunal to determine in all cases whether an alteration should be made in the provisional lists submitted to them."

The result is that a person who has had no notice, and no opportunity of making his objection, which might, if he had the opportunity, result in the figures being reduced, has to be content to sit under the injustice, and is called upon to pay rates at a figure which he has never had an opportunity of objecting to, although it is true that at a much later date, perhaps nine or ten months afterwards, he may have an opportunity of demanding the money back, and perhaps may have to resort to legal proceedings before he ever gets it back.

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(1) [1918] A. C. 525, 528.

(2) Ibid. 532.

(3) Ibid. 525, 539.

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But in view of the decision of the House of Lords in *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1), I feel compelled to agree to this rule being discharged.

HUMPHREYS J. I agree. Whatever view I might take of sub-s. 7 of s. 47 (and that would be without authority) I am bound by the expressions of opinion of Lord Finlay and Lord Parmoor in *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1) to hold that what was done by the assessment committee in this case was within their power, and therefore the rule must be discharged.

Rule discharged.

Solicitors showing cause: *Allen & Son.*
Solicitors supporting the order: *Wedlake, Letts & Birds.*

T. W. M.

THE KING *v.* ROBERT LLEWELYN THOMAS.

C. C. A.

1933
July 3.

Criminal Law—Trial—Appeal—Welsh Jurors—Evidence of insufficient Knowledge of English Language—Affidavits by Jurors not admissible.

Where a verdict in a criminal trial, at which the evidence was given partly in English and partly in Welsh, was delivered in the sight and hearing of all the jury without protest, the Court of Criminal Appeal refused to admit affidavits by two of the jurors showing that they did not understand the English language sufficiently well to follow the proceedings.

APPEAL against conviction and sentence.

The appellant, Robert Llewelyn Thomas, was convicted at Merionethshire Sessions of sheep stealing, and was sentenced to twelve months' imprisonment with hard labour. He appealed against his conviction on the ground that two members of the jury did not understand English sufficiently well to follow the evidence or to understand the speeches of counsel or the summing-up. He also appealed against the sentence. The evidence at the trial was given partly

(1) [1918] A. C. 525.

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in English and partly in Welsh, an interpreter being present in court throughout. The oath was administered in the English language. Counsel for the appellant applied for leave to refer to affidavits by two jurors showing that they did not understand the English language sufficiently well to enable them to follow the proceedings.

R. G. S. Bankes for the appellant. It is conceded that evidence cannot be given of what took place in the jury room or of what the jury thought of the effect of their answers: see *Ellis* v. *Deheer* (1) and *Raphael* v. *Bank of England*. (2) But the Court can admit evidence with regard to the capacity of the jurors to hear the case: see *Rex* v. *Hancox* (3) and *Roberts* v. *Hughes*. (4) The matter is open to the Court, if it desires to do so, to consider these affidavits in so far as they deal with matters which took place in open court. In the circumstances of this case, if the facts set out in the affidavits are true, the trial was so unsatisfactory that the conviction ought to be quashed: see *Rex* v. *Syme* (5); *Rex* v. *Melik* (6); and *Rex* v. *Willmont*. (7)

J. Jones Roberts for the Crown. The practice is now well established that affidavits by jurors will not be admitted. Jurors who have taken the oath, sat through the trial and listened to the verdict, without taking any objection, cannot afterwards be heard to say anything which tends to nullify the verdict: see *Nesbitt* v. *Parrett* (8) and *Owen* v. *Warburton*. (9)

The Court (LORD HEWART C.J., HORRIDGE and HUMPHREYS JJ.) dismissed the appeal against the conviction, but reduced the sentence. The judgment of the Court, which was as follows, was delivered by

LORD HEWART C.J. This appellant, Robert Llewelyn Thomas, was convicted at the Merionethshire Sessions upon

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(1) [1922] 2 K. B. 113.

(2) (1855) 17 C. B. 161, 174; 4 W. R. 10, 11.

(3) (1913) 8 Cr. App. Rep. 193.

(4) (1841) 7 M. & W. 399.

(5) (1914) 10 Cr. App. Rep. 284, 286.

(6) (1915) 11 Cr. App. Rep. 100.

(7) (1914) 30 Times L. R. 499.

(8) (1902) 18 Times L. R. 510.

(9) (1805) 1 Bos. & P. (N. R.) 326.

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an indictment containing two counts. The first count charged that on January 26, 1933, he stole a sheep, and the second charged that on the same day he stole another sheep. He was sentenced to twelve months' imprisonment with hard labour. He applied some three weeks out of time for an extension of time in which to apply for leave to appeal against conviction and sentence. The only ground of appeal is that two members of the jury did not understand English sufficiently well to follow the evidence, or to understand the speeches, or the summing-up. The appellant, it is to be observed, was defended by counsel, and no question of that sort was raised at the trial, nor was any protest made at the trial nor for some weeks afterwards. The case for the prosecution was that the appellant stole these two sheep and took them to be slaughtered, and the defence was that he sent them to be slaughtered by mistake.

Mr. Bankes, in his very able argument, has endeavoured to persuade the Court that it ought to look at the affidavits from two members of the jury showing that they did not sufficiently well understand the English language. In our opinion we ought not to look at these affidavits. I am not going to review the mass of authority on this point, and will refer to three points only. In the first place this is a case of felony, and in cases of felony every juror as he or she comes to the Book to be sworn, unless challenged, takes the oath, or makes an affirmation in the prescribed form. That form, which is familiar, is in the English language, and it is clear that that oath was taken in the present case.

With regard to this class of affidavits, it seems to come within the mischief referred to by Willes J. in *Raphael* v. *Bank of England* (1), where he said: "If either the affidavit is as to what was passing in the mind of the particular juryman, or as to what took place in the jury room, in the latter case it is not admissible, and in the former it does not lie in the mouth of a person who hears and makes no objection to come afterwards to alter the verdict by the explanation that he dissented in a voice which the counsel, with all

(1) (1855) 4 W. R. 10, 11.

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his vigilance, and the judge did not hear." Finally, in *Ellis* v. *Deheer* (1), Bankes L.J. said: "When a verdict is delivered in the sight and hearing of all the jury without protest their assent to it is conclusively inferred." It needs little reflection to see how wide the door would be opened if the contrary doctrine were to prevail. We think, therefore, this conviction must stand. With regard to the sentence, the appellant is a man of good character, and in all the circumstances the sentence may be reduced to six months' imprisonment.

Appeal against conviction dismissed.
Sentence reduced.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Robert Griffith, Blaenau-Festiniog.*

T. W. M.

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(1) [1922] 2 K. B. 113, 118.

REPORTER'S NOTE.—The decision in this case was criticized by Lord Atkin in delivering the judgment of the Judicial Committee of the Privy Council in *Ras Behari Lal and Others* v. *The King-Emperor* [1933] W. N. 207.

Approved. AMAL. ANTHRACITE COLLIERIES, LTD. *v.* WILDS. [1948] 2 All E.R. 252.

BACON *v.* A. W. WILLS AND SONS, LIMITED.

C. A.
1933
June 15.

Workmen's Compensation—Silicosis—Certificate of total Disablement—Date of Disablement more than two Years after last Employment—Mode of computing Compensation—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 9, 47—*Metal Grinding Industries* (*Silicosis*) *Scheme,* 1927 (*S. R. & O.,* 1927, *No.* 380), *paras.* 4, 9, 10.

Where a workman is certified to be totally disabled from silicosis and the date of disablement is more than two years after the date when he was last employed in a process coming within the Metal Grinding Industries (Silicosis) Scheme, 1927, he can, in view of the proviso to para. 4, sub-para. 1, of the Scheme that "no compensation shall be payable if the workman has not been employed at any time in the processes within the three years previous to the date of total disablement," recover compensation from that last employer, notwithstanding that by para. 10 of the Scheme ss. 8 to 13 of the Workmen's Compensation Act, 1925, are made applicable for the purpose of fixing the amount of compensation but with the exception that the amount of compensation is to be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under the Scheme.

The provision in s. 9, sub-s. 2, of the Act that the weekly payment of compensation in cases of total incapacity shall be fixed by reference to "the workman's average weekly earnings during the previous twelve months" must for the purpose of the Scheme be moulded so as to apply to the altered circumstances, by treating it as referring to the previous twelve months during which the workman was employed in a process coming within the Scheme.

APPEAL from an award of the judge of the Birmingham County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

A workman called Matthew Bacon had since 1904 been employed by A. W. Wills & Sons, Ld., as a grinder working on sandstone, and with the interval of his war service continued in the employment until July, 1928, when he was rejected for work on sandstone. He was subsequently put on to other work, but in circumstances which, as the county court judge found, brought him within the Metal Grinding Industries (Silicosis) Scheme, 1927, a Scheme made by the Secretary of State under a power conferred by s. 47 of the Workmen's Compensation Act, 1925. In July, 1930, the workman was discharged for lack of work, and had since

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been unemployed. On September 30, 1932, he obtained a certificate from the Medical Board appointed under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, that he was totally disabled from silicosis and that the total disablement commenced on August 26, 1932. On January 26, 1933, the workman commenced proceedings for compensation on the footing that his average weekly earnings from July, 1929, to July, 1930, were *1l. 15s. 6d.*

The county court judge, after dealing with a number of points raised on behalf of the employers which he decided in favour of the workman and as to which there was no appeal, said that the last objection taken was that, as the workman's earnings in the twelve months preceding the date of disablement were nil no compensation could be recovered having regard to para. 10 of the Scheme, which provided that the compensation was to be fixed in accordance with the provisions contained in ss. 8 to 13 inclusive of the Workmen's Compensation Act, 1925. Counsel for the employers contended that ss. 8 to 13 left no place for a claim where nothing had been earned during the previous twelve months. He was of opinion that the objection prevailed and was fatal to the workman's application.

The workman appealed.

The Metal Grinding Industries (Silicosis) Scheme, 1927, provides:

"4 (1.) Where the certifying surgeon certifies in pursuance of this Scheme that a workman is totally disabled for work from silicosis . . . . and the disease is due to employment in the processes, whether under one or more employers, compensation shall be payable to the workman during such disablement . . . . , as if the disease were a personal injury by accident arising out of and in the course of that employment, as provided by the Act, but subject to the modifications hereinafter contained.

Provided that no compensation shall be payable if the workman has not been employed at any time in the processes within the three years previous to the date of total disablement . . . .

9. The compensation shall be claimed and recoverable from the employer who last employed the workman in the processes; . . . .

10. The compensation payable under this Scheme shall be fixed in accordance with the provisions contained in the Act under the head *Amount of Compensation* (sections 8 to 13 inclusive) for fixing the compensation in cases of . . . . total disablement, and the said sections shall apply accordingly, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under this Scheme."

Coley for the appellant. The respondents as the last employers of the workman in a process causing silicosis are liable to pay him compensation, although his employment by them ceased more than two years before the date of disablement. The twelve months' limit fixed by s. 43 in regard to other industrial diseases does not apply under the Metal Grinding Industries (Silicosis) Scheme, 1927, having regard to the proviso to para. 4 and the exception in para. 10. The principle of the Scheme is to give compensation to a workman disabled from silicosis who has been employed in one of the processes to which the Scheme applies within three years before the date of disablement. It is argued that no compensation is recoverable because under para. 10 of the Scheme ss. 8 to 13 of the Workmen's Compensation Act, 1925, are made applicable, and by s. 9, sub-s. 2 (i.), the weekly payment of compensation in cases of total incapacity is to be " a sum not exceeding fifty per cent. of the workman's average weekly earnings during the previous twelve months. . . . ." It is contended that in view of the clear provisions in the Scheme making compensation recoverable when the workman has been employed in the process " within the three years previous to the date of total disablement," s. 9, sub-s. 2 (i.), cannot deprive the workman in this case of the right to compensation, especially in view of the exception to para. 10 of the Scheme providing that " the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under this Scheme."

R. H. Norris for the respondents. Although under the Scheme the workman has only to show that he has been employed in a process to which the Scheme applies within three years of the disablement in order to bring himself within the Scheme, that does not necessarily confer on him a right to weekly compensation. The right to compensation is conferred by para. 10, and it says that the compensation is to be assessed under ss. 8 to 13 of the Act except that it is to be calculated with reference to his earnings under the employer from whom compensation is recoverable. That exception is not new but appears in s. 43, sub-s. 1 (*d*), although by sub-s. 1 (*c*) compensation is in the case of an industrial disease coming within the section only recoverable from the employer who last employed the workman during the twelve months preceding the date of disablement. There are two time factors under the Scheme: the first is the time for succumbing to the disease, and that is three years; but the second relates to the assessment of compensation, and that, as a result of ss. 8 to 13 of the Act being made applicable, is twelve months. Under s. 9, sub-s. 2 (i.), of the Act the compensation during total disablement has to be determined by reference to the earnings during the twelve months preceding the date of accidental injury, which under both s. 43 and the Scheme is the date of disablement. There is no justification for fixing the compensation by reference to the workman's earnings over two years before the date of disablement. Nor can any assistance be obtained from s. 10, sub-s. 1, here, for it only applies in certain specified circumstances which do not exist here. The county court judge was therefore right in holding that no compensation was recoverable in this case.

[No reply was called for.]

LORD HANWORTH M.R. This appeal must be allowed. It raises a point of importance and difficulty, and I am not surprised that the county court judge came to the conclusion to which he did, for I think Mr. Norris is quite right in saying that at the present time there is no authority to give him sufficient guidance; but although there is no relevant authority there are principles which we think he ought to have applied and which we shall apply in this Court.

The facts are of the simplest kind. This man Bacon worked with these employers in work which brings him within the Silicosis Scheme of 1927. It is quite unnecessary to define the work, because the county court judge has found that that was the nature of his employment by these employers and there is no cross-appeal. He worked in such employment down to July, 1930. On September 30, 1932, after examination by a certifying surgeon, he was granted a certificate that he was totally disabled by reason of his having suffered from silicosis, and the date of disablement was fixed by the surgeon at August 26, 1932. Thus it will be plain that more than two years after the time when he had been employed by Messrs. A. W. Wills & Sons, Ld., he was found to be suffering from and totally disabled by silicosis. Did that give him the right to go to the employers, who had not employed him during the interval of two years, and to seek compensation at their hands?

The Workmen's Compensation Act has been passed in order to enable workmen to obtain compensation from their employers which without its provisions they would be unable to obtain. There are two sections of the Act which provide for compensation being given to workmen in respect of industrial disease. The one is s. 43, which applies the Act to industrial diseases within the meaning of the Act and provides that, where a man obtains a certificate that he is suffering from a disease mentioned in the Third Schedule to the Act and is thereby disabled and the disease is due to the nature of the employment in which the workman was employed at any time within twelve months before the date of disablement, then he can impute his disablement to his employer and recover compensation in respect of his disablement, the date of the disablement being treated as the date of an injury suffered within the Act. Sect. 43, sub-s. 1 (*c*), provides that the compensation is to be "recoverable from the employer who last employed the workman during the said twelve months" previous to the date of disablement, and there are provisions to which Mr. Norris rightly called our attention which have relation to contributions which may be obtained by the employer who is immediately liable to the workman from other employers who have employed him during the same limited time. The other section is s. 47, which gives power to the Secretary of State to provide by Scheme "for the payment of compensation by the employers of workmen in any specified industry or process or group of industries or processes involving exposure to silica dust." Under the power conferred by that section the Metal Grinding Industries (Silicosis) Scheme, 1927, has come into force. That Scheme applies to the present case, and it says in para. 4, sub-para. 1: "Where the certifying surgeon certifies in pursuance of this Scheme that a workman is totally disabled for work from silicosis . . . . and the disease is due to employment in the processes, whether under one or more employers, compensation shall be payable to the workman during such disablement or to his dependants, as the case may be, as if the disease were a personal injury by accident arising out of and in the course of that employment, as provided by the Act but subject to the modifications hereinafter contained." No more explicit words could be found to give effect to s. 47. There is an important proviso to para. 4, sub-para. 1: "Provided that no compensation shall be payable if the workman has not been employed at any time in the processes within the three years previous to the date of total disablement as defined in paragraph 7 of this Scheme."

Our attention was rightly called to the fact that s. 43 in terms fixes a time limit of twelve months. Sect. 47 does not lay down that any Scheme made thereunder must contain a similar time limit, and para. 4 of the Scheme makes it clear that a liability is imposed on persons who have employed the workman at any time during the three years previous to the date of the total disablement. There is reason in this provision, for we are told that silicosis is a disease of which the onset is slow, so that its existence may not be revealed within the course of the preceding twelve months only. As I read para. 4, therefore, there is a clear proviso that compensation will be payable if the workman has during three years previous to his disablement been employed in the processes involving exposure to silica dust. By para. 9 the compensation shall be claimed and recoverable from the employer who last employed the workman in the processes. Therefore reading paras. 4 and 9 together it seems plain that this Scheme imposes a liability upon employers who were employers of the workman at a time not more than three years previous to the date of disablement.

There is then a definite statutory direction that compensation shall be payable to a workman in respect of his contraction of a disease by reason of his employment in processes involving exposure to silica dust. How, then, is this compensation so definitely directed to be ascertained? Para. 10 says that: "The compensation payable under this Scheme shall be fixed in accordance with the provisions contained in the Act under the head *Amount of Compensation* (sections 8 to 13 inclusive) for fixing the compensation in cases of death and total disablement and the said sections shall apply accordingly, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under this Scheme." Let me take that paragraph and subject it to examination. The compensation is to be fixed in accordance with the well known provisions of ss. 8 to 13 of the Act, and those sections "shall apply accordingly." What does that mean? It means that they are to apply for the purpose of fixing the compensation to be paid. The word "accordingly" seems to exclude the suggested interpretation which would make them apply for the purpose of defeating the compensation which

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paras. 4 and 9 have already declared to be payable to the workman from the particular employer indicated. Further, an exception is made: "except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable under this Scheme." From whom then is compensation here recoverable? It is from the persons who were his employers for a period over two years before; and it is for the purpose of estimating that liability that we are to look at ss. 8 to 13 of the Act, but with the exception that we are to calculate the amount of compensation by reference to the earnings of the workman under those employers who are liable under the extended span of time permitted under s. 47 and paras. 4 and 9 of the Scheme.

I turn therefore to consider how we are to apply these sections "accordingly." The objection is taken by Mr. Norris —and it is an important objection—that in ss. 8 to 13 the estimate of the weekly payments of compensation or of the earnings by reference to which the compensation is calculated ultimately brings one up against the period of the previous twelve months; and he says that in the present case that is not possible, because in the twelve months previous to the certified date of disablement, August 26, 1932, Bacon was earning nothing in the employment of A. W. Wills & Sons, Ld., and hence that there can be no compensation. I do not so read the Act. From time to time difficulties analogous to this appear in working out an Act of Parliament. I remember one example of this very well; it is to be found in *Curtis* v. *Stovin*. (1) At a time when the limit of all personal actions triable in the county court was 50*l.*, provision was made by s. 65 of the County Courts Act, 1888, that "where in any action of contract brought in the High Court the claim endorsed on the writ does not exceed 100*l.*, ... it shall be lawful for either party to apply to a judge . . . . to order such action to be tried in any Court in which the action might have been commenced"; and I remember

(1) (1889) 22 Q. B. D. 513.

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that the Court of Appeal felt some difficulty as to how to interpret the power given to a Court to remit to a county court a case which ex concessis could never have been commenced there, because the size of the claim put it outside the limit of the county court jurisdiction. Bowen L.J. in giving judgment said (1): "The rules for the construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule, viz., that, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed ut res magis valeat quam pereat," and accordingly they gave effect to the section by holding that the case could be remitted to the Court in which the action might have been commenced, if it had been a case within the jurisdiction of the county court.

The rule applied in the Court of Appeal then has often been applied on other occasions and must be applied at the present time. Would it be right for this Court to say that although under s. 47 a Silicosis Scheme has provided for compensation being given to a man who is suffering from silicosis and the Scheme has indicated in para. 4 that he may recover from his employer during the three years preceding the date of disablement and by para. 9 imposed a liability to pay compensation upon that employer yet by reason of para. 10, which makes ss. 8 to 13 of the Act apply, with an exception, for the purpose of ascertaining the amount of compensation, we are to hold that the whole effect of s. 47 is nullified and paras. 4 and 9 of the Scheme made inoperative? I shrink from any such decision, and I turn therefore to consider how we are to apply ss. 8 to 13. It appears to me that the right course is to employ exactly the same reasoning as in *Curtis* v. *Stovin* (2), and to say that when applied to this Scheme the words "the previous twelve months" in these sections do not mean the twelve months immediately preceding the date of disablement but the previous twelve months in which there was employment of the workman by the employer.

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(1) 22 Q. B. D. 517.

(2) 22 Q. B. D. 513.

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It is noticeable that whereas in s. 9, sub-s. 2, of the Act the words used are "the previous twelve months," in s. 11 you get a different phrase, "his average weekly earnings during the twelve months immediately preceding the review." As that word "immediately" is not to be found in s. 9, it seems by no means difficult to apply ss. 8 to 13 "accordingly," and with the necessary exception which obviously is intended to remove a sort of rigidity from ss. 8 to 13 and to make them applicable mutatis mutandis for the purpose for which they are introduced. Applying, therefore, the rule of law to which I have referred, I find it possible to interpret the words "the previous twelve months" as the previous twelve months when the workman was employed by the employers liable to pay compensation under para. 9 of the Scheme in the employment which gave rise to the disablement in respect of which he has become entitled to receive compensation under para. 4.

For these reasons it appears to me that the difficulty pointed out by Mr. Norris is not insuperable and that the rule of law to which I have referred compels us—and happily compels us—to give a sensible interpretation to the Act and to enable the workman to recover compensation. In these circumstances the appeal will be allowed with costs.

LAWRENCE L.J. I agree. The case turns upon the true meaning and effect of para. 10 of the Silicosis Scheme, 1927, which was made under s. 47 of the Act. Sect. 47 does not limit the power of the Secretary of State to make Schemes for compensating workmen who are suffering from silicosis or from the effects of silica dust to cases in which the workman has been disabled by that disease in any employment during the twelve months immediately preceding the disablement. The Secretary of State is therefore free to make a Scheme providing for a longer period than twelve months during which the workman can recover compensation after he has left the employment in the process which caused his disease. Para. 10 of the Scheme provides how the amount of the compensation to which the workman was entitled ought to be assessed. That paragraph has to be construed with reference to the rest of the provisions in the Scheme. Under para. 4 of the Scheme it is plain that there is no limit to the time within which the workman can make his claim if he should suffer from the disease except that contained in a proviso at the end of sub-para. 1, which is as follows: "Provided that no compensation shall be payable if the workman has not been employed at any time in the processes within three years previous to the date of total disablement as defined in paragraph 7 of this Scheme." Therefore the Scheme sets up a limit of three years during which the workman can claim, if at any time during that period he has been engaged in the process which has caused his disease. Under para. 9 the employer liable to pay the compensation is the employer who last employed the workman in the process. It follows from these provisions that the workman can make a claim against the employer who employed him in the process (say) within the period of two years and eleven months before the date of disablement, although he has not been employed in that process either by that employer or any other employer since, and even although he has been out of employment or has been in other employment during that time. Para. 10 deals with the manner in which the amount of the compensation to which the workman is undoubtedly entitled ought to be assessed, and it is contended by Mr. Norris that the reference in that clause to ss. 8 to 13 of the Act makes it impossible in a case like the present to arrive at any basis for the assessment of the amount of compensation, and that therefore the workman cannot receive any compensation, in spite of the fact that the Scheme clearly provides for his receiving compensation. In my opinion that is taking far too narrow a view of the construction of para. 10. The important part of para. 10, when read in conjunction with paras. 4 and 9 of the Scheme, is to be found, in my judgment, at the end of that paragraph. It is true, as Mr. Norris points out, that that part is also to be found in the industrial diseases section, s. 43, but there it is not found in the same context. The context to which I have already alluded

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enables one to see how that provision in para. 10 can be applied in order to carry out the true intention of the Scheme. It provides: "Except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under this Scheme." To take the present case, the employer of the workman from whom compensation is recoverable is the employer from whose employment the workman was discharged about two years ago. Therefore under para. 10 what the Court has to do is to ascertain with reference to the earnings of the workman in that employment what his compensation shall be. Bearing that in mind and turning then to ss. 8 to 13 of the Act to see how the amount is to be arrived at, I find no difficulty in moulding those sections to ascertain the amount of compensation under para. 10 of the Scheme. My Lord in his judgment has pointed out how that can be done, and I do not intend to repeat what he has said. Sect. 9 of the Act was apparently the main difficulty in the way of the learned county court judge, but I think in order to ascertain the compensation payable under the Scheme in circumstances such as we have here the word "previous" must be given some meaning which it might not have if the Scheme had been limited to a period of twelve months. I think the reasonable and proper way of making s. 9 of the Act fit in with the ascertainment of compensation under para. 10 of the Scheme is either to omit the word "previous" or to apply that word to the last twelve months of the employment in the process which has given rise to the disease. It does not seem to me difficult to construe para. 10 as meaning that the provisions of ss. 8 to 13 of the Act shall so far as applicable apply for the purpose of ascertaining the compensation payable to a workman under the Scheme. If it be so read, I think there is no difficulty in applying the machinery there provided in order to ascertain the compensation payable in the present case. If that were not done it would mean that the Scheme would in the circumstances be rendered nugatory and the workman would not receive any compensation at all.

For these reasons, I agree that the appeal should be allowed.

SLESSER L.J. I agree that this appeal should be allowed. The learned judge has said that he finds nothing inconsistent between his view and the proviso to para. 4 of this Scheme. I am not of that opinion. It does not seem to be disputed, and it is certainly the case, that the effect of the proviso to para. 4 is to give a workman a right to recover compensation when he has been employed in the processes within the three years previous to the date of total disablement; and to say that he is excluded from obtaining compensation because he has not in fact earned any money during the last year does seem to me to be contrary to the intention of para. 4 of the Scheme. Mr. Norris has said that there is no authority on this matter. I think, although there may not be any direct authority, it is possible to obtain considerable guidance from observations in two or three cases where this Court and the House of Lords have had to consider the respective functions of provisions conferring a right to compensation and those relating to the mode of fixing the amount of compensation. In Part I. of this Scheme a right to compensation over the whole three years' period is given, but it is alleged that by Part II. the right to compensation is limited to cases where there have been earnings within the last twelve months. Sects. 8 to 13 of the Act, which were formerly contained in a Schedule, similarly lay down the method of calculating the amount; and as I have said, there are important dicta to the effect, as I read them, that that Schedule is mere machinery for ascertaining the amount, and must not be looked to for the purpose of ascertaining the right to compensation. The first of the passages I refer to is in Lord Halsbury's judgment in *Lysons* v. *Andrew Knowles & Sons, Ld.* (1), where he reads s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897, which provides that: "If in any employment to which this Act applies personal injury by accident arising out of and in the course

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(1) [1901] A. C. 79, 85.

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of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation," and then he proceeds thus: "That I regard as the affirmative or leading enactment. What follows appears to me to be equivalent to a statement that the mode in which that compensation is to be ascertained and determined is to be according to the method and manner provided for in the schedule. The language itself (I do not want to undervalue the argument) is 'liable to pay compensation in accordance with the First Schedule to this Act.'" Then Lord Macnaghten in *Ball* v. *William Hunt & Sons, Ld.* (1), says: "The right to compensation is given by the Act. The Act is the workmen's charter. The schedule prescribes the scale of compensation and the mode and conditions of its enjoyment. That is the office of the schedule. The key to the meaning of the Legislature is not to be looked for there." Finally, Buckley L.J., as he then was, in *Harwood* v. *Wyken Colliery Co.* (2), says (3): "The intention of the schedule is to prescribe the scale of compensation and the mode and conditions of its enjoyment."

So, as I say, the principle has been laid down on several occasions that you are not to ascertain the right to compensation by consideration solely of the method by which you ascertain the amount. Here that right is clearly stated to extend over the whole of the three years preceding the date of disablement; and the only way it can be suggested that this right has been interfered with is by looking at Part II. of the Scheme, which is equivalent to the Schedule to the earlier Workmen's Compensation Acts, which in reference to ordinary accidents states the method of fixing the amount of compensation. But, in my view, the Legislature has been at pains in applying ss. 8 to 13 to the Scheme to keep alive the right to compensation from any employer who had employed the workman during the three years preceding the date of disablement by saying, "Except that the amount of compensation shall be calculated with reference to the earnings

(1) [1912] A. C. 496, 500.

(2) [1913] 2 K. B. 158.

(3) Ibid. 164.

of the workman under the employer from whom compensation is recoverable under this Scheme." It is for three years after a workman has left his employment that an employer from whom compensation is recoverable under this Scheme may find himself liable to pay it. Then, as the Master of the Rolls has said, when we turn to ss. 9 and 10 of the Act they do not cause that insuperable difficulty which Mr. Norris would have us find there, when we make the modification necessary in view of the fact that there is here a three years' liability. I read the reference to "the previous twelve months" to mean the previous twelve months when the employer was actually last employing the man. Taking the date of his last employment with that employer who is primarily liable under the proviso, the earnings during the period of twelve months before that will give the basis of computation of compensation. To put this matter in another way, the word "previous" in those sections must have exactly the same content as it would have in a case where the compensation falls to be computed within a year from the date of the actual accident. That seems to me to satisfy all the requirements of the Legislature, because it is generally, as my Lord has indicated, a canon of construction that if the language of a statute be not too intractable, that language will be so used as to fulfil the intention of the Legislature and deal with the mischief for which the statute was enacted.

[The amount of compensation having been agreed, an award was made of weekly compensation at the rate of 1*l.* 1*s.* 4*d.* per week from August 26, 1932.]

Appeal allowed.

Solicitors: *Langhams, for Philip Baker & Co., Birmingham*; *Berrymans, for T. Haynes Duffell & Son, Birmingham.*

H. C. G.

1933
April 5, 6.

BRITISH PHOTOMATON TRADING COMPANY, LIMITED *v.* HENRY PLAYFAIR, LIMITED.

Landlord and Tenant—Income Tax, Sch. A—Action by Tenant against Landlord for recovery of Tax deducted by Sub-tenant and Occupier—Cause of Action—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 211, *sub-s.* 2; *Sch. A, No. VIII., rr.* 1, 4, *sub-r.* 1, *proviso* 2—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 39, *sub-s.* 1—*Finance* (*No.* 2) *Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 49), *Sch. III., para.* 3.

A sub-tenant in occupation of premises paid income tax under Sch. A assessed upon the premises and deducted the amount of the tax so paid from his next payment of rent due on June 24, but paid on July 1 to the tenants of the premises who, before such payment to them, had paid their rent due on the same date in respect of the premises to their landlords in full. No further payment of rent was due under the lease from the tenants to the landlords. In an action by the tenants against the landlords, based on sub-s. 2 of s. 211 of the Income Tax Act, 1918, for the payment to them of the amount of tax deducted by their sub-tenant from his rent payable to them, it was:—

Held, that the cause of action granted by the sub-section was for the recovery of "the sum which might have been deducted, as if it were a debt from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force," and by the second proviso to sub-r. 1 of r. 4, No. VIII., Sch. A, of the Income Tax Act, 1918, the tenants had no right of deduction of any greater sum than the amount of tax "actually paid" by them. The plaintiffs, the tenants, not having so paid the tax, had no right to deduct the tax as against their landlords when they paid their rent and, therefore, obtained no cause of action under the sub-section.

THE claim of the plaintiffs, British Photomaton Trading Company, Ld., was for 243*l.* 9*s.*, an assessment of income tax, under Sch. A of the Income Tax Act, 1918, and the Finance Act, 1930, on No. 39A Market Street, Manchester (hereinafter called "the premises"), alleged to be deductible from a payment of rent made by the plaintiffs to the defendants, Henry Playfair, Ld., on June 24, 1931, as tenants of the premises, but not in fact deducted.

By a lease dated December 23, 1924, the defendants let the premises to Harry Smith from December 25, 1924, for a term of years ending (in the events which had happened) on December 25, 1931, at a rent of 2500*l.* per annum, payable half-yearly in advance on December 25 and June 24 in each year. By a deed of assignment dated April 23, 1928, Harry Smith assigned all his interest in the lease of December 23, 1924, to Photomaton Corporation, Ld., and by deed of assignment dated September 20, 1928, that company assigned all their interest in the said lease to Photomaton, Lancashire and Midland, Ld. (hereinafter referred to as "the Lancashire Company"). By a sub-lease dated April 30, 1929, the Lancashire Company sub-let to Morris Feather the premises, together with certain other premises in Market Street, Manchester, for a term ending on December 23, 1931, at a rent payable half-yearly in advance on June 24 and December 25 in each year. By deed of assignment dated April 30, 1930, the Lancashire Company assigned all their interest in the premises, subject to the said sub-lease, to the plaintiffs, with effect as from November 1, 1929. On April 10, 1931, the plaintiffs went into voluntary liquidation.

At the dates material to this case the defendants were the landlords, the plaintiffs were the tenants, and Morris Feather was the sub-tenant and occupier of the premises.

On July 15, 1929, the defendants wrote to the inspector of taxes for the district of Manchester requesting that in future application should be made direct to the occupier of the premises for income tax under Sch. A in respect of those premises, and on October 5, 1929, the inspector of taxes assented to this request.

On January 1, 1931, an assessment to income tax on the premises for the year ending April 5, 1931, made under Sch. A of the Income Tax Act, 1918, and the Finance Act, 1930, in the sum of 243*l.* 9*s.*, became payable. On or before June 23, 1931, Morris Feather, the sub-tenant and occupier of the premises, paid to the collector of taxes this sum in respect of the said assessment. On or about June 24, 1931, and before July 1, 1931, the plaintiffs paid to the defendants the half-year's rent then due in advance for the premises without any deduction for income tax. On July 1, 1931, Morris Feather, the sub-tenant, paid to the plaintiffs the half-year's rent due in advance on June 24, 1931, under the sub-lease, but deducted therefrom the sum of 243*l.* 9*s.*, the amount he had paid for income tax under Sch. A. Such payment was the first payment of rent payable by Morris Feather to the plaintiffs after the date upon which he had paid the tax.

The plaintiffs then claimed from the defendants this sum of 243*l.* 9*s.* deducted from the rent paid to them by their sub-tenant. The defendants replied that it would be in order for the plaintiffs to deduct this sum from the next payment of rent due. On the plaintiffs pointing out that the final payment of rent under the lease had already been made, the defendants replied, by their solicitors: "Schedule A tax is only recoverable from a landlord by deduction on making payment of rent after payment or allowance of the tax. If there is no more rent to pay there is nothing from which to deduct the tax. It is well settled that a tenant who pays rent without making the deduction cannot afterwards recover back the money from the landlord."

The plaintiffs then brought this action, claiming the repayment of 243*l.* 9*s.*, relying on s. 211, sub-s. 2, of the Income Tax Act, 1918, s. 39, sub-s. 1, of the Finance Act, 1927, and the Finance (No. 2) Act, 1931, Third Schedule, para. 3. (1) Alternatively they claimed this sum from the defendants as money paid to them under a mistake of fact.

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(1) The Income Tax Act, 1918, Sch. A, No. VIII., Rule 1, provides:

(1.) "A tenant occupier of any lands, tenements, hereditaments or heritages who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord . . . . an amount representing the rate or rates of tax in force during the period through which the said rent was accruing due for every twenty shillings thereof, the said deduction to be made out of the first payment thereafter made on account of rent . . . . Provided also that a tenant or occupier shall not be entitled to deduct out of the rent any greater sum than the amount of tax charged in respect of such property as aforesaid, and actually paid by him."

Rule 4: (1.) "Where any lands, tenements, hereditaments or heritages are subject to the payment of any annual sum, whether payable half-yearly or at any shorter or more distant period, a landlord, owner or proprietor who has been charged to tax under this Schedule or from whom tax is deductible under this rule or rule 1 or rule 3, shall be entitled on making such payment to deduct and retain thereout so much of the said tax as represents the rate or rates of income tax in force during the period through which the said payment was accruing due . . . . Provided also that no such person

Millard Tucker K.C. and *Wilfrid Price* for the plaintiffs. The plaintiffs being intermediate tenants, and not the actual occupiers, their right to deduct tax as against the defendants is governed by r. 4, and not r. 1, of No. VIII., Sch. A, Income Tax Act, 1918: *Rossdale* v. *Fryer*. (1) Although s. 39 of the Finance Act, 1927, does not apply to deduction of tax under r. 1 of No. VIII., Sch. A, it does apply to deduction under r. 4, and therefore the latter rule must now be read in conjunction with that section. The effect is that on paying their rent to the defendants as their immediate landlords, the plaintiffs could deduct from their rent either

as aforesaid who is also a tenant or the occupier of the lands, tenements, hereditaments or heritages, shall be entitled to deduct out of any rent any greater sum than the amount of tax charged in respect of any such property and actually paid by him."

Sect. 211, sub-s. 2: "Any person liable to pay any rent, interest or annuity, or to make any other annual payment, shall be authorised to make any deduction on account of tax for any year of assessment which he has failed to make previously to the passing of the Act imposing the tax for that year, or to make up any deficiency in any such deduction which has been so made, on the occasion of the next payment of the rent, interest or annuity, or making of the other annual payment after the passing of the Act so imposing the tax, in addition to any other deduction which he may be by law authorised to make, and shall also be entitled, if there is no future payment from which the deduction may be made, to recover the sum which might have been deducted as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force."

The Finance Act, 1927, provides: Sect. 39 (1.) "Such of the provisions of the Income Tax Acts as provide that income tax may be deducted from any payment at the rate or rates of tax in force during the period through which the payment was accruing due . . . . shall have effect as if they provided that tax may be deducted or shall be allowed at the standard rate for the year in which the amount payable becomes due. Provided that this subsection shall not—

(*a*) apply to the deduction to be made under Rule 1 of No. VIII. in Schedule A; or

(*b*) affect the first proviso to Rule 4 of the said No. VIII. relating to deductions in Scotland."

The Finance (No. 2) Act, 1931, Sch. III., para. 3, provides: "Subject, in any case where paragraph 2 of this schedule applies, to the provisions of that paragraph, s. 211 of the Income Tax Act, 1918 . . . . shall apply as if (*a*) this Act were the Act imposing the tax for the year, and (*b*) a reference to October 15, 1931, were, so far as relates to any deficiency in the amount of tax deducted from any payment made after the passing of this Act but before the date aforesaid, substituted for any reference to the passing of the Act imposing the tax for the year . . . ."

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(1) [1922] 2 K. B. 303.

1933

British Photomaton Trading Co. *v.* Henry Playfair, Ld.

an amount equal to tax at the standard rate in force on the date when rent became due, or the amount of tax which had been deducted as against them by Morris Feather, the sub-tenant and occupier, whichever was the less. As 243*l.* 9*s.* was less in amount than tax at 4*s.* 6*d.* (subsequently increased to 5*s.* by Finance (No. 2) Act, 1931) on the rent, only 243*l.* 9*s.* could be deducted.

It is true that when the plaintiffs paid their rent to the defendants on June 24, 1931, which was the last payment of rent they had to make, they themselves had not actually suffered any deduction of tax, because Feather had not then paid his own rent to the plaintiffs, and did not do so until July 1, 1931, from which payment he then deducted the 243*l.* 9*s.*, and it was not until that date that they actually suffered the deduction. But Feather had in fact paid this tax to the collector on or before June 23, 1931. Therefore the plaintiffs were, on June 24, 1931, when they had paid their rent to the defendants, landlords "from whom tax is deductible under . . . . Rule 1," within the meaning of r. 4, sub-r. 1.

The year of assessment begins on each April 6 and ends on the following April 5, and the Finance Act of each year reimposes the tax for that year. The right to deduct tax under r. 4, sub-r. 1, from any payment of rent which becomes due during any particular year of assessment arises either from the Provisional Collection of Taxes Act, 1913, or from the Finance Act for that year of assessment, and not from the Finance Act of any previous year of assessment, because the Income Tax Acts are annual Acts, each year's Act imposing the tax anew: see *Bowles* v. *Bank of England* (1) and the Provisional Collection of Taxes Act, 1913, which was passed in consequence of that decision. Moreover the terms of s. 39 of the Finance Act, 1927, support this view, at any rate in respect of all years of assessment since the year 1928–9 inclusive, whatever may have been the position before. See also the opening words of para. 3, Third Schedule, Finance (No. 2) Act, 1931.

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(1) [1913] 1 Ch. 57.

The rent paid by the plaintiffs to the defendants became due on June 24, 1931, i.e., in the year of assessment 1931–32. The rent paid by Feather to the plaintiffs on July 1, 1931, had also become due on June 24, 1931, i.e., in the same year of assessment. But when Feather deducted the 243*l*. 9*s*. tax from his rent, he deducted it under r. 1 of No. VIII., Sch. A, which has different provisions from those of r. 4 and is not affected by s. 39 of the Finance Act, 1927. His deduction of tax therefore gave the plaintiffs a corresponding right to pass on the deduction to the defendants, and although Feather was only able to deduct tax from his payment of rent made in 1931–32 because he had paid tax to that amount in respect of the previous year of assessment 1930–31, the right of passing on that deduction would only arise to the plaintiffs by virtue of the Provisional Collection of Taxes Act, 1913, or of the Finance Act for the year 1931–32, and not by virtue of the Finance Act, 1930. It is contended therefore that the right of deduction arising to the plaintiffs was the right to make a deduction of tax for the year of assessment 1931–32.

The plaintiffs' cause of action here is given by the express terms of sub-s. 2 of s. 211 of the Income Tax Act, 1918, which is a re-enactment of s. 14, sub-s. 2, of the Revenue Act, 1911. By that sub-section any person liable to pay any rent is authorized to make " any deduction on account of tax for any year of assessment which he has failed to make previously to the passing of the Act imposing the tax for that year." The words " any year of assessment " in that sub-section qualify the word " deduction " and not the word " tax." Any contrary construction would be inconsistent with the explanation of the scope of the sub-section given by the Court of Appeal in *Hill* v. *Kirshenstein*. (1) As regards the application of that sub-section to the year 1931–32, the Act imposing the tax for that year was first the Finance Act, 1931, and subsequently the Finance (No. 2) Act, 1931: see particularly para. 3 of the Third Schedule to the latter Act. The Finance Act, 1931, was passed on

(1) [1920] 3 K. B. 556.

July 31, 1931; the Finance (No. 2) Act, 1931, on October 5, 1931.

The plaintiffs made a payment of rent on June 24, 1931, i.e., in the year 1931–32 and before the passing of the Act imposing the tax for that year. They failed to deduct tax from that payment. As this was the last payment of rent they had to make, s. 211, sub-s. 2, in terms gives them the right to recover as a debt from the defendants the tax they failed to deduct. It is admitted that s. 211 was not designed to meet cases of this kind, but it is submitted that its wording is wide enough to cover the particular facts of this case, and to give the plaintiffs the right to recover this sum of 243*l*. 9*s*. by this action.

Evershed K.C. and *J. H. Bowe* for the defendants. The last proviso to r. 4, sub-r. 1, provides that a person who is also a tenant cannot, when paying his rent to his immediate landlord, deduct more tax than the amount he himself has actually paid. It is admitted that the plaintiffs when they paid their rent to the defendants on June 24, 1931, had not in fact suffered any deduction of tax themselves. It was not until July 1, 1931, when they received their rent from Feather, that they actually suffered any deduction of tax.

Sect. 211, sub-s. 2, of the Income Tax Act, 1918, therefore does not apply to this case, as, under the concluding words of that sub-section, the amount of tax which has not been deducted can only be recovered "as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force." On the facts of this case the defendants do not answer this description. When the plaintiffs paid their rent to the defendants on June 24, 1931, they could not have deducted any tax as against the defendants, even if the Act had then been in force, because none at that time had been "actually paid" by them.

Millard Tucker K.C. in reply. The words "actually paid by him" in the last proviso to r. 4, sub-r. 1, must be given a wider meaning, and must be construed in the light of what is obviously the scheme of the Act—namely, to pass on to each intermediate landlord the proportion of tax attributable to the rent he receives. In *Rossdale* v. *Fryer* (1) the words were in fact construed as meaning either the actual payment of tax which the intermediate tenant may make, or the allowance of it which he makes, or has to make to, his own sub-tenant. That was the view of Shearman J., which was not dissented from by the Court of Appeal. It is submitted that they must also be construed as including the amount of tax which the intermediate tenant will ultimately have to allow to his own sub-tenant, otherwise, in cases where the rent paid by the intermediate tenant to his own landlord is the last payment of rent he has to make, as in this case, no machinery exists for the purpose of passing on to the superior landlord his due proportion of the tax.

MacKinnon J. The question at issue is whether at law there is any right on the part of the plaintiffs, the tenants, to recover from the defendants, their landlords, this sum of money, 243*l*. 9*s*.—the amount of income tax, assessed under Sch. A, paid by their sub-tenant, the occupier, and deducted by him from his rent paid to them. I think it is clear that there is no cause of action for the recovery from the defendants, the landlords, of this sum, landlord's property tax, which has in fact been paid by the plaintiffs, their tenants, unless the plaintiffs can discover some provision in the Income Tax Acts which gives them such a cause of action. I leave out, for the moment, the other cause of action for which the plaintiffs have contended—namely, the claim that they can recover this amount as being paid with their rent to the defendants under a mistake of fact. Unless they can establish that right, any other can only arise out of the Income Tax Acts. I have before me an extremely careful analysis of those provisions. There is, I think, only in one place any reference to a right to recover by action, and otherwise than by deduction of rent, tax which a tenant has paid in respect of landlord's property tax, and that is to be found in sub-s. 2 of s. 211 of the Income Tax Act, 1918. Counsel for the plaintiffs has argued, and it was an argument which was as ingenious as it was clear, that the plaintiffs are entitled by virtue of the provisions of that sub-section to maintain this present action.

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(1) [1922] 2 K. B. 303.

But before referring to that section it is, I think, necessary to refer to Sch. A and its rules, under which the whole of the question of liability for tax as between sub-tenant, tenant and landlord arises. Sch. A, No. VIII., provides by rules as to the rights of persons by whom tax is paid to recoupment in certain cases. Rule 1 is as follows: "A tenant occupier of any lands, tenements, hereditaments or heritages who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord for the time being . . . . an amount representing the rate or rates of tax in force during the period through which the said rent was accruing due for every twenty shillings thereof, the said deduction to be made out of the first payment thereafter made on account of rent . . . . Provided also that a tenant or occupier shall not be entitled to deduct out of the rent any greater sum than the amount of tax charged in respect of such property as aforesaid and actually paid by him." It was under that r. 1 that Mr. Feather, the sub-tenant and occupier of these premises, was entitled to and did deduct the 243*l.* 9*s.* when he paid his rent on July 1, 1931, to the plaintiffs, because that was the first payment of rent made by him after the payment of the 243*l.* 9*s.* tax. But if he had not done so, he would have had no right thereafter, either by action or by deduction from further rent payable, to recover. It was held in *Hill* v. *Kirshenstein* (1) that a tenant who pays a sum in respect of landlord's property tax and omits to deduct it from the next payment of rent has no right to deduct it subsequently. That is r. 1, and that is the rule under which Mr. Feather exercised his right of deduction. Then r. 4 deals with the position where there is an intermediate landlord, and this is the rule under which, if any, it is said arises, or would have arisen, the right between

(1) [1920] 3 K. B. 556.

the plaintiffs and the defendants. By r. 4, sub-r. 1: "Where any lands, tenements, hereditaments or heritages are subject to the payment of any annual sum, whether payable half-yearly or at any shorter or more distant period, a landlord, owner or proprietor who has been charged to tax under this Schedule or from whom tax is deductible under this rule or rule 1 or rule 3, shall be entitled on making such payment to deduct and retain thereout so much of the said tax as represents the rate or rates of income tax in force during the period through which the said payment was accruing due . . . ." That is the rule under which, if before paying the defendants the plaintiffs had received Mr. Feather's payment less the 243*l.* 9*s.*, they would have been entitled, as the persons by whom tax is deductible, to have similarly deducted it in making their payment to the defendants. But that rule is subject to two provisos, the second of which is material: "Provided also that no such person as aforesaid who is also a tenant or the occupier of the lands, tenements, hereditaments or heritages, shall be entitled to deduct out of any rent any greater sum than the amount of tax charged in respect of any such property and actually paid by him."

In my opinion the difficulty arises from those final words. If, as has happened in this case—taking the position between Mr. Feather, the sub-tenant and occupier, the plaintiffs, the tenants, and the defendants, the landlords—if Mr. Feather delays his payment of rent to the plaintiffs and the plaintiffs desire to be prompt in discharging their obligation to pay their rent to the defendants on June 24, even though the plaintiffs know that when Mr. Feather pays his rent he would be sure to deduct the 243*l.* 9*s.*, it would look as though they were not entitled to make that deduction, in anticipation, from the rent due to the defendants, because they would not in the terms of the proviso have "actually paid" the sum which was sought to be deducted. And if, as in this case, this is the last payment of any rent which under their lease the plaintiffs were liable to pay to the defendants and if they pay their rent due on June 24, in strict law there would be no opportunity for their recovering this sum that they knew Mr. Feather was likely to and was entitled to deduct, when he paid his rent to them. The position seems somewhat ridiculous and absurd, if, as counsel for the defendants contends, that is the result of the terms in which this legislation is couched. It looks as though those responsible for framing this legislation had overlooked the position where no future payment of rent is due to the landlords from which a tenant can deduct the amount of tax deducted from the rent paid to him by the sub-tenant and occupier. The same difficulty may arise directly between tenant and landlord where there is no sub-tenant. It might well be that the last payment of rent was made by a tenant before he had been called on to pay income tax under Sch. A, and he may have no right to recover that back from the landlord in the absence of any provision in the Act of 1918 giving him a right of action in respect of such payment of income tax otherwise than by deduction from the rent that he was liable to pay.

In these provisions for the collection of income tax from the point of view of the revenue, in order to secure justice between the various parties interested in leaseholds, I should have thought that it was desirable there should have been provision for giving a man who has paid what in effect is another man's income tax a right of recovery of that tax from the person really liable to pay it, in cases where there is no rent payable from which it is possible to deduct the tax that has been paid. Counsel for the plaintiffs contends that he has found such a provision and found it in s. 211, sub-s. 2, of the Income Tax Act, 1918. At the same time counsel says very frankly: "I recognize that this is only an incidental result of that sub-section; it was not passed with any such intention but only to deal with a difficulty arising from the alteration of the rate of income tax, but the language of the sub-section is sufficiently wide to give the plaintiffs the cause of action for which I contend in this case." That sub-section is in these words: "Any person liable to pay any rent, interest or annuity, or to make any other annual payment, shall be authorised to make any deduction on account of tax for any year of assessment which he has failed to make previously to the passing of the Act imposing the tax for that year . . . ." Now, the year of assessment here is 1931–32. The Finance Acts of that year were passed—there were two, an unusual and distressing event—the one on July 31 and the other on October 5, 1931—dates after that in June, 1931, when the plaintiffs paid this rent to the defendants without making the deduction. It is contended, therefore, that in the terms of the sub-section, this is a case of a failure to make a deduction on account of tax for a year of assessment which the plaintiffs have failed to make previously to the passing of the Act imposing the tax for that year. The sub-section continues: "and shall also be entitled, if there is no future payment from which the deduction may be made, to recover the sum which might have been deducted as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force." It looks as if that gives this right of action in respect of this sum, because it is a sum which the plaintiffs failed to deduct before the passing of the Finance Act for that year, and the circumstances were that there was no future payment from which the plaintiffs could make that deduction. That being so, it is contended that the plaintiffs are entitled to recover this sum as a debt.

But I am afraid that the plaintiffs' difficulty arises from the last words of the sub-section: "as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force." That, I think, refers one back to r. 4, sub-r. 1, of No. VIII. of Sch. A of the Income Tax Act, 1918, because that would be the Act imposing the tax by means of the subsequent and appropriate Finance Act. Therefore, we are brought back again to the question of whether under that rule the plaintiffs would have been entitled to deduct the sum of 243*l.* 9*s.* at the date when they paid their rent in June, 1931. It is a result against which I am inclined to struggle, but I think I must accept the argument of counsel for the defendants that in strict law and according to the strict wording of the rule the plaintiffs could not have had a right to make that deduction when they paid their rent, because at that date Mr. Feather, the sub-tenant and occupier, had not paid his rent to them, and had not deducted the tax as against them. Therefore within the meaning of the second proviso to r. 4, sub-r. 1, of No. VIII., Sch. A, it cannot be said that this 243*l*. 9*s*. had been "actually paid" by the plaintiffs. Accordingly, the defendants do not answer the description given in sub-s. 2 of s. 211 of the Income Tax Act, 1918: "as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force." The plaintiffs here are afforded no cause of action by the sub-section.

As I have said, this is a result against which one is inclined to struggle, because it tends to outrage both common sense and what is fair. But this, unfortunately, on the construction of these difficult and obscure provisions of the Income Tax Act, 1918, is the only result at which I can arrive. I think that the plaintiffs, after their payment of rent in June, 1931, without deduction of the tax, which they could not then have made, in the absence of any future payment of rent from which the deduction could be made, had no cause of action under the Income Tax Acts to recover back the amount of the tax, which had been deducted from the rent paid to them by their sub-tenant—landlord's property tax, which they, the tenants, had paid. [His Lordship then reviewed the evidence and stated that he was unable to find that the sum claimed had been paid to the defendants under a mistake of fact.]

Judgment for the defendants.

Solicitors for plaintiffs: *J. D. Langton & Passmore.*
Solicitors for defendants: *R. H. Behrend & Co.*

C. G. M.

ROBINSON (INSPECTOR OF TAXES) *v.* CORRY.
CORRY *v.* ROBINSON (INSPECTOR OF TAXES).

1933
July 17.

Revenue—Income Tax—Civil Servant employed on Duties abroad—Liability to Assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, rr.* 1, 6, 18.

An established Civil Servant was appointed by the Lords Commissioners of the Admiralty to a post which necessitated his residing in a colony for several years. During that time he received, in addition to the salary appropriate to his rank in the Civil Service, a colonial allowance to provide for the increased cost of living in the colony. During part of the time he occupied an official house provided for him, and during other parts of the time he received a housing allowance in lieu of an official house:—

Held, (1.) that he was assessable to income tax under Sch. E of the Income Tax Act, 1918, and that the tax was chargeable, not only on the salary, but also on the colonial allowance and housing allowance, which must be brought into charge and were not deductible as expenses;

(2.) that the annual value of the official residence was not income chargeable with tax, since it was not money, nor convertible into money by the Civil Servant.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners, on March 1, 1932, E. W. C. Corry, of the Royal Naval Torpedo Factory, Greenock (hereinafter called "the appellant"), appealed against assessments to income tax under Sch. E of the Income Tax Act, 1918 (1), by the Commissioners of Income Tax for the Admiralty. The assessments were made on him as deputy cashier of H. M. Naval Base at Singapore for the

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(1) The Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. E: "Tax under Schedule E shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom, other than annuities charged under Schedule C, for every twenty shillings of the annual amount thereof."

Rules applicable to Sch. E. Rule 1: "Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule, or to whom any annuity, pension, or stipend, as described in this Schedule, is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom . . . ."

Rule 6: "The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described, namely . . . . (*c*) public offices under three years ending April 5, 1930, 1931 and 1932, in the sums of 1053*l.* 10*s.*, 1342*l.* and 1194*l.* 2*s.* 8*d.* respectively.

2. On July 19, 1928, the appellant, an established Civil Servant, left the United Kingdom, retaining no residence therein, to take up an appointment as deputy cashier in H. M. Naval Base at Singapore. This appointment was approved by the Lords Commissioners of the Admiralty in May, 1928, to date August 1, 1928. The official pay of the appellant as the holder of that appointment was payable to and received by him in the colony of the Straits Settlements from August 1, 1928, to July 24, 1931, during his residence in the colony. His official pay for the period from July 25, 1931, to September 30, 1931, during his return voyage from the Straits Settlements and during subsequent leave of absence granted in respect of his service in the colony, was payable and was paid to him in London, except for the sum of 52*l.* which he received as an advance in the colony. The appellant landed in the United Kingdom on his return thereto on September 22, 1931. Since October 1, 1931, he had served as deputy cashier at H. M. Torpedo Factory, Greenock, to which he was appointed (his appointment to date October 1, 1931) in August, 1931. From

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the civil government of the Crown . . . . ; (*d*) officers in His Majesty's navy; . . . . (*k*) all other public offices, or employments of profit which are of a public nature."

Rule 10: "Where the Treasury are satisfied with respect to any class of persons in receipt of any salary, fees, or emoluments payable out of the public revenue that such persons are obliged to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties in respect of which such salary, fees, or emoluments are payable, the Treasury may fix such sum, as in their opinion represents a fair equivalent of the average annual amount laid out and expended as aforesaid by persons of that class, and in charging the tax on the said salary, fees, or emoluments, there shall be deducted from the amount thereof the sums so fixed by the Treasury: Provided that if any person would, but for the provisions of this rule, be entitled to deduct a larger amount than the sum so fixed, that sum may be deducted instead of the sum so fixed."

Rule 18: "(2.) A person chargeable in respect of an office or employment of profit shall be deemed to exercise it at the head office of the department under which it is held, and shall be assessed and charged at that head office, although the duties of the office or employment are performed, or any profits thereof are payable elsewhere, whether within the United Kingdom or not."

July 19, 1928, until October 1, 1931, the appellant was not resident in the United Kingdom.

3. Whilst in the colony the appellant was entitled to be provided with housing accommodation or to be paid an allowance for house rent in lieu thereof, at a rate fixed by the Admiralty with the concurrence of the Treasury for persons of the appellant's class or rank. A condition of the occupation of an official house was that it was not to be let in whole or in part to any person whatsoever.

When in occupation of an official house in the colony the appellant was required to make it his constant place of residence (except so far as he might obtain leave of absence), and when he did not occupy an official house he was required to live within a reasonable distance of his place of duty in the colony.

The appellant was in occupation of an official house from August 20, 1928, to September 20, 1929. For the remainder of his residence in the colony he provided himself with a house, but during part of that period—namely, from June 15, 1930, to April 29, 1931—owing to a dispute as to the quality of the housing accommodation to be provided, he received no allowance for house rent in lieu thereof.

He admitted that the house allowance, when received, was more than sufficient to pay the rent of the house with which he provided himself, but he incurred the expense of a car in getting to and from his place of duty.

4. In addition to his salary, which was paid to him at the same rate as that payable for a like office or employment in the United Kingdom, the appellant received in the colony an allowance called "colonial allowance" at a rate fixed by the Admiralty with the concurrence of the Treasury for persons of the appellant's class or rank. This allowance was granted to meet the extra expenses of residence outside the United Kingdom.

5. The appellant's salary and allowances were paid under the following Admiralty regulations:—

> 263. When the rate of salary is not stated in the order appointing a person to a vacancy, the scale of salary

previously allowed to the office is to be continued unless it has been previously ordered to be reduced on a vacancy.

264. Allowances in addition to civil salary to officers not borne on ships' books, such as fixed periodical sums for special services, are payable for the same period as salary, unless directed otherwise. Colonial allowances and allowances for house-rent are to be paid from the day the officer joins the establishment until the day he is discharged from its books, subject, however, in the case of colonial allowances to the limitations imposed by Article 278.

278. Colonial allowances, or allowances granted to meet increased cost of living, are payable to officers of Naval establishments abroad, during absence on ordinary or sick leave from the colony in which those establishments are situated, when they proceed to visit a place in a neighbouring country, but in the case of an officer who proceeds to the United Kingdom, payment of colonial allowance should cease on the date preceding that of arrival in the United Kingdom, and should recommence on the day following that of departure.

279. Officers of Naval establishments abroad who are entitled to house-rent allowances are to receive them when on temporary leave of absence.

6. The cash amounts received by the appellant in respect of his appointments in the United Kingdom and in the colony respectively for the years preceding the respective years of assessment to which the appeal relates were :—

	1928–29.			1929–30.			1930–31.		
	£	*s.*	*d.*	£	*s.*	*d.*	£	*s.*	*d.*
Salary and Bonus .	665	12	11*	671	15	0	662	9	8
House Allowance .	6	16	11	111	16	11	57	13	10
Colonial Allowance .	316	12	8	495	16	8	473	19	2
	989	2	6	1,279	8	7	1,194	2	7

* 224*l.* 10*s.* 6*d.* in the United Kingdom ; 441*l.* 2*s.* 5*d.* in the colony.

7. The assessments appealed against were made to include the above amounts in full together with the annual value of the official house which the appellant occupied during part of his residence in the colony. The amount of such annual value was not disputed, being 64*l*. 9*s*. 8*d*. for the period to March 31, 1929, and 49*l*. 12*s*. 11*d*. for the period to November 6, 1929.

8. Before his departure from the United Kingdom, whilst he was abroad, and since his return to the United Kingdom, the appellant had belonged to the same class in the service of the Admiralty, and his salary throughout, as distinct from allowances, was the salary of his class. In his tenure of office in the colony he followed a predecessor and was followed by a successor. On taking up that office he vacated the office which he held in the United Kingdom, and he was followed therein by a successor.

9. No order had been made by the Treasury under r. 10 of Sch. E relating to the class of persons to which the appellant belonged.

10. The appellant contended :—

(i.) That he held an office or employment abroad, which he exercised wholly abroad, and that his income therefrom was not subject to taxation within the United Kingdom under Sch. E of the Income Tax Act, 1918 ;

(ii.) That in any case any value ascribed to an official house occupied by him abroad was not income taxable under Sch. E ;

(iii.) That in any case the colonial allowances and the house allowances payable to the appellant in the colony were not income chargeable to tax under Sch. E : or alternatively were deductible in computation of such income ;

(iv.) That he was entitled to deduct the cost of providing himself with housing accommodation for the period from June 15, 1930, to April 29, 1931, in arriving at the income (if any) chargeable to tax.

11. The Inspector of Taxes contended :—

(i.) That the appellant's official emoluments were subject to taxation under Sch. E of the Income Tax Acts ;

(ii.) That the value of an official house was taxable as falling within the words "salaries, fees, perquisites or profits whatsoever" appearing in r. 1 of Sch. E;

(iii.) That the colonial allowances and house allowances were taxable as falling within the same words;

(iv.) That the appellant was not entitled to deduct in arriving at the amount of the assessment any cost of providing himself with housing accommodation.

(v.) That the assessments were correct and should be confirmed with the exception that the assessment for 1930–31 should be reduced to 1329*l.*

12. The following cases amongst others were referred to before the Commissioners: *Proctor* v. *Ryall* (1); *Pickles* v. *Foster* (2); *Foulsham* v. *Pickles* (3); *Colquhoun* v. *Brooks* (4); *G. W. R. Co.* v. *Bater* (5); *Barson* v. *Airey* (6); *M'Donald* v. *Shand* (7); *Tennant* v. *Smith* (8); *Ricketts* v. *Colquhoun* (9); *Fergusson* v. *Noble* (10); *Nolder* v. *Walters* (11); *Sutton* v. *Commissioners of Inland Revenue* (12); *Cook* v. *Knott* (13); *Revell* v. *Directors of Elworthy Bros. & Co., Ld.* (14); *Cordy* v. *Gordon* (15); *Machon* v. *McLoughlin.* (16)

13. The Commissioners who heard the appeal gave their respective opinions in writing as follows:—

"In this case I have no doubt that income tax is not chargeable on the value of the official residence which was occupied by the appellant in Singapore. As regards the main question whether the tax is chargeable on his salary, and the colonial allowance, and the house allowance in lieu of

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(1) (1928) 14 Tax Cas. 204.

(2) [1913] 1 K. B. 174; 6 Tax Cas. 131.

(3) [1925] A. C. 458; 9 Tax Cas. 261.

(4) (1889) 14 App. Cas. 493; 2 Tax Cas. 490.

(5) [1922] 2 A. C. 1; 8 Tax Cas. 231.

(6) (1925) 10 Tax Cas. 609.

(7) [1923] A. C. 337; 8 Tax Cas. 420.

(8) [1892] A. C. 150; 3 Tax Cas. 158.

(9) [1926] A. C. 1; 10 Tax Cas. 118.

(10) 1919 S. C. 534; 7 Tax Cas. 176.

(11) (1930) 15 Tax Cas. 380.

(12) (1929) 14 Tax Cas. 662.

(13) (1887) 2 Tax Cas. 246.

(14) (1890) 3 Tax Cas. 12.

(15) [1925] 2 K. B. 276; 9 Tax Cas. 304.

(16) (1926) 11 Tax Cas. 83.

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CORRY v. ROBINSON.

residence, I have grave doubts as to the correctness of the official view. The case, however, is not one in which, in my opinion, I should press my colleague, who has formed a clear opinion, to withdraw that opinion in favour of the appellant, and I accordingly concur with him in confirming the assessment in principle on this main question.

W. J. BRAITHWAITE."

"The appellant is a deputy cashier on the permanent establishment of the Admiralty, and his remuneration is paid by the Admiralty out of moneys voted by Parliament. During the period under discussion his official duties were wholly performed in Singapore.

"It has always been the practice to charge income tax under Sch. E on the emoluments of all persons holding an office or employment of a permanent nature on the establishment of any Department of the Government of the United Kingdom, whether their duties were performed in the United Kingdom or elsewhere. The assessment of the appellant's remuneration is thus in accordance with a settled practice of ninety years' standing.

"The only cases in which the Courts have considered the question of the liability to assessment under Sch. E of persons performing their duties abroad have been those of officers or servants of companies. In *Pickles* v. *Foster* (1) the appeal was allowed on the ground that the word 'department' in s. 147 of the Act of 1842 (now r. 18 of the Rules applicable to Sch. E) could not be stretched so as to bring within the provisions of the section the officers or servants of a company. However extravagant the invocation of s. 147 may have been as an argument for maintaining the charge of the servant of a company performing his duties abroad, there is no indication in the judgment that the section would have been regarded as irrelevant if the question under consideration had been the liability of an officer in the employment of the Government. As is shown by the report in the Law Reports (2), the whole course of the argument on both sides proceeded upon the view that the emoluments of an office or employment under a Government Department are clearly brought within the charge notwithstanding that the duties are wholly performed abroad, and the judgment contains nothing to cast doubt upon this view, but implicitly accepts it.

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(1) [1913] 1 K. B. 174; 6 Tax Cas.131. (2) [1913] 1 K. B. 174, 179–181.

"In *Proctor* v. *Ryall* (1) it was held that a director of a company whose duties were mainly but not entirely exercised out of the United Kingdom held an office within the United Kingdom and was assessable by the Commissioners for the district where the registered office of the company was situated, quite independently of r. 18, which has nothing to do with companies. It is true that in reviewing the case of *Pickles* v. *Foster* (2) Rowlatt J. used words which seem to imply that the decision in that case had turned on the consideration that the rule was purely machinery and could only operate in the case of a person chargeable independently of it, but this passing observation can hardly constitute an authority for extending the decision to a class of employment distinguishable from that dealt with either in the case reviewed or in the case then before the Court.

"The question discussed in *Pickles* v. *Foster* (2) whether employment under a company 'is brought within the provisions of s. 147 so as constructively to make the office or employment one which is exercised within the United Kingdom, though the duties thereof are in fact wholly performed out of the United Kingdom,' does not arise in the case of a person holding an office or employment under a Government Department. If, as was assumed throughout the case, s. 147 or r. 18 can be looked to for assistance in interpreting the phrase 'public offices or employments of profit within the United Kingdom,' the rule is clearly applicable to such a person and supports the practice by its provision that he shall be assessed at the head office of the Department although the duties are performed elsewhere, whether within the United Kingdom or not. Further support for the official view could be found in the old s. 148 of the Act of 1842, which specially exempted any public office or

(1) 14 Tax Cas. 204, 215.

(2) [1913] 1 K. B. 174, 183; 6 Tax Cas. 131, 136.

employment the duties whereof were necessarily and permanently performed in Ireland. Reference may also be made to s. 66, sub-s. 2 (*c*), of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), reproduced in s. 5, sub-s. 3 (*b*), of the Income Tax Act, 1918, and s. 42, sub-s. 5, of the Finance Act, 1927 (17 & 18 Geo. 5, c. 10), which authorizes, for the purposes of super-tax and surtax, the deduction from the total income of an individual in the service of the Crown abroad of such sums as the Treasury may allow for expenses which in their opinion are necessarily incidental to the discharge of the functions of his office for which an allowance has not been made for the purposes of income tax.

"It is suggested that these provisions relate to officers in the Navy, the Army and the Air Force, and have no application to persons holding civil appointments. The argument could not have been used before 1918, and its acceptance now would involve the improbable assumption that an important change in the law was made by a slight alteration in the order of words (1) and the insertion of 'or by the officers' at the beginning of r. 6 of Sch. E in the consolidating Act, and that notwithstanding this change words of general description were retained in s. 5, sub-s. 3 (*b*), and r. 18, sub-r. 2, of Sch. E where a reference to those particular classes of officers would have been sufficient and more appropriate. It would even seem that if persons in the service of the Crown abroad were not chargeable under the Act of 1842, the provision in s. 147 of that Act as to duties performed out of Great Britain and s. 66, sub-s. 2 (*c*), of the 1909–10 Act had no meaning, and that officers on foreign service in the Navy, the Army and the Air Force were brought within the charge for the first time by the alteration of the wording of r. 6 of Sch. E in the Act of 1918.

"In my opinion s. 147 of the Act of 1842, though primarily a machinery section, cannot be ignored in interpreting the phrase 'public offices and employments of profit within the United

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(1) The words of the third rule of Sch. E under s. 146 of the Income Tax Act, 1842, were: "The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain; (videlicet) . . . ."

Kingdom'; as applied to offices and employments held under a Government Department. The Act of 1918 did not make any change of substance; the practice of charging officers under a Government Department though their duties are performed abroad is and always has been correct, and the assessment should be confirmed so far as it relates to the appellant's salary and the allowance received by him in cash. The inclusion in the assessment of the value of his official residence in Singapore appears to rest only upon a convention by which the value of such residence is treated as an emolument of office for the purposes of both taxation and pension, and this, in the case of residences abroad, cannot be supported in law for income tax, whatever may be the position as regards pension.

P. WILLIAMSON."

The Commissioners also held that no deduction could be made for expenses alleged to have been incurred by the appellant by reason of the cost or extra cost of housing or living in the colony. They amended the assessments to exclude the annual value of the official house which had been occupied by the appellant to the figures shown in para. 6 above.

The appellant required a case to be stated on all the matters which the Commissioners decided against him; there was a cross-appeal by the Inspector of Taxes as to the exclusion of the value of the official residence.

The questions of law for the opinion of the Court were:—

(*a*) Whether the appellant was assessable to income tax in respect of his office or employment in the colony;

(*b*) Whether the annual value of the official house which he occupied was assessable under Sch. E;

(*c*) Whether the allowances paid to him for a residence and extra cost of living were assessable under Sch. E;

(*d*) Whether he was entitled to deduct the extra cost of residence and of living as expenses;

(*e*) Whether he was entitled to deduct the expense of providing himself with housing accommodation for the period from June 15, 1930, to April 29, 1931.

Needham K.C. and *Cyril King* for the appellant.

Sir Boyd Merriman S.-G. and *R. P. Hills* for the Crown.

FINLAY J. In my opinion the decision of the Commissioners was correct, and I think that both the main appeal by Mr. Corry and also the cross-appeal of the Crown fail.

Mr. Corry's appeal raises a point no doubt of much importance, as is pointed out in the decision of the very experienced Special Commissioner, Mr. Williamson, who gave his views at length, his colleague, Mr. Braithwaite, concurring, but concurring with perfectly obvious doubt and hesitation. Mr. Williamson, as I say, points out that the matter is of importance, because, as was not disputed, for a very long period assessments have been made on the assumption that persons in the position occupied by the appellant here are chargeable to income tax. I entertain no doubt that a startling revolution would be effected in income tax practice if it were now held that no tax was exigible in these circumstances. Of course, that does not in any way relieve me from the necessity of looking at the Schedule, and at any cases which may be material.

The facts can be quite concisely stated. The appellant, Mr. Corry, is an established Civil Servant. On July 19, 1928, he left for Singapore, because he had been appointed by the Lords Commissioners of the Admiralty deputy cashier in His Majesty's Naval Base at Singapore. He continued for several years to occupy the position of deputy cashier, and in that position he received the pay appropriate to his rank in the Civil Service. He also received a house allowance, and what is called a colonial allowance, which was in effect an allowance in addition to salary designed to meet the hardship of living abroad, and the extra expenditure likely to be incurred by officials who for one reason or another connected with their work are compelled to live abroad.

Those really are substantially the whole of the facts. There is a paragraph in the Case, to which a good deal of attention was directed, which points out that the appellant while abroad, and since his return, has belonged to the same class in the service of the Admiralty. In his tenure of office in the colony he followed a predecessor and was followed by a successor, and the same thing happened when he vacated his office in the United Kingdom. The question, to my mind, is simply whether he is chargeable under Sch. E. That is the main point.

The actual charge is, I suppose, to be found in Sch. E itself: "Tax under Sch. E shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom other than annuities charged under Sch. C." That, in effect, imposes a tax in respect of public offices or employments of profit. There are various rules. [His Lordship read rr. 1, 6, and 18.] Rule 18 is, I think, quite correctly described by Mr. Needham as machinery, but it is none the less important to look at it, because, as everybody knows, at all events since *Colquhoun* v. *Brooks* (1), while the main thing to look at is the charging section, and while, if you do not bring a person within the charging section, machinery will not bring him there, it may be important in considering the ambit of charge to see what is the machinery which the Legislature has provided. I assent to the view that if the charging Schedule itself is not wide enough to cover an office held under the Admiralty where, in fact, the duties of the office are performed outside the United Kingdom, this machinery section will not suffice to bring it into charge. But when I look at the charging Schedule I see nothing to cut it down in the way suggested. On the contrary, I think that reading what are called the charging parts of the Schedule, apart from the aid given by this machinery section, the correct view would be that public offices and employments under the Admiralty, under the Treasury, under the War Office, and so on, are taxable, and taxable wherever the particular person may happen to perform the duties of his office. That appears to me to be the fair result looking at the words of the Act alone.

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(1) 14 App. Cas. 493; 2 Tax Cas. 490.

I was referred to several cases. *Pickles* v. *Foster* (1) appears to me to throw little light on the present case. In that case there was an argument referred to very unfavourably in *Proctor* v. *Ryall* (2) by Rowlatt J., the object of which was to convince Horridge J. that the word "Department" could be stretched sufficiently to make it have reference to the case not of employment under the Crown, but to the case of employment under an ordinary trading company. That argument was rejected, but I see nothing in the judgment of Horridge J. to suggest that he would have been of opinion that a person who was in the service of the Crown fell outside the tax merely because his work was performed abroad. *Foulsham* v. *Pickles* (3), the second case, has no direct bearing, I think, upon the present case. I think Mr. Needham was right about that, but it is useful to observe the grounds—more than one ground—on which in that case the learned Lords held that the office could not be considered to be a possession abroad, because it was an office under which the remuneration was paid and payable in Liverpool. I need say no more about that. With regard to *Proctor* v. *Ryall* (4) I accept, and accept absolutely, the observations which Rowlatt J. made in that case with regard to machinery, and the proper use to make of machinery with reference to charging sections; but I see nothing in his decision to conflict in any way with the conclusion at which I have arrived.

The substance of my view can be put quite shortly. I think the true view is that where you find—I am not dealing with trading companies at all now—an employment under the Crown, that is a person who holds an office, whatever it may be, in one of the Departments of State, then that person is assessable to tax, and assessable to tax in the United Kingdom wherever may be the precise place, whether in the United Kingdom, or partly in the United Kingdom and partly abroad, or for the time being wholly abroad, where he exercises his functions and does his work. On that ground I decide the main point in favour of the Crown. I think that the view of Mr. Williamson, concurred in, as I said a moment ago—and it is proper that it should be mentioned —with obvious doubt and hesitation by Mr. Braithwaite, was correct.

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(1) [1913] 1 K. B. 174; 6 Tax Cas. 131.

(2) 14 Tax Cas. 204, 215.

(3) [1925] A. C. 458; 9 Tax Cas. 261.

(4) 14 Tax Cas. 204.

There were one or two other points as to which there was an appeal by the appellant. Those had reference to the question whether the allowances paid to him for a residence and for extra cost of living were assessable or were deductible. It seems to me to be clear that those sums are assessable and do not form the subject of deduction. What it really comes to is this, that extra money does go into the appellant's pocket. Extra money goes into his pocket partly in order that he may be able to provide himself with a house, and partly in order that he may be able to meet those expenses incidental to residence in a far off country in the Tropics. There is really very little more to be said about that. I am not going to review the authorities, but it seems to me clear both on principle and on several authorities to which my attention was called, that the deduction cannot be allowed, and that the claim of the appellant, to deduct these various expenses, must fail. I may refer merely in passing to the judgment of Rowlatt J. in *Cordy* v. *Gordon* (1), where the principle is very clearly laid down. It is useful that I should refer to that case because it leads me to the next and last point, which is the basis of the Crown's appeal. On that, I again agree with the view which seems to have been quite clearly arrived at by both the Special Commissioners, for Mr. Braithwaite's hesitation has no application to this at all. The view of the Crown is that the value of the house which, during part of the time was occupied by the appellant, ought to be counted as part of his income. I do not think that that view is correct. I think *Tennant* v. *Smith* (2), the leading case in the House of Lords, is a clear authority against it. The distinction was

(1) [1925] 2 K. B. 276; 9 Tax Cas. 304.
(2) [1892] A. C. 150; 3 Tax Cas. 158.

quite correctly pointed out to me by the learned Solicitor-General that there the house was the subject of taxation under Sch. A, but I do not think that is the real basis of the decision. I think the real basis of the decision was that the house was not money, nor anything that could be turned into money. I am confirmed in that view by a passage to which Mr. Needham called my attention at the beginning of the judgment of Rowlatt J. in *Cordy* v. *Gordon* (1), the case to which I referred just now on the other point, where he says this: "It is, I think, clear that . . . . if the holder of an office receives a salary in money, and in addition to that salary receives some advantage such as residence, or residence with board and washing, of which he is obliged to avail himself and which he cannot in any case transfer to another for profit to himself, the amount of his income for purposes of taxation is limited to what he receives in cash." Then the learned judge refers to *Tennant* v. *Smith*. (2) In that state of the authorities, it seems to me to be reasonably plain that the appeal of the Crown must fail on the ground, which appears to have been approved by Rowlatt J. and which I also think a good ground, that, after all, the tax is a tax on income, that is, on what goes into the man's pocket. The mere fact that he may be saved something by being given a house does not make that income for this purpose. Nothing goes into his pocket, and on that ground, and following, and, as I conceive it, applying, *Tennant* v. *Smith* (2), I think I must decide the Crown's appeal against the Crown. The result is that both the appeal and the cross-appeal fail, and each will be dismissed with costs.

Appeal and Cross-appeal dismissed.

Solicitors for appellant: *Linklaters & Paines.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

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(1) [1925] 2 K. B. 276, 282; 9 Tax Cas. 304, 308.
(2) [1892] A. C. 150; 3 Tax Cas. 158.

J. W. H.

C. A.
1933
June 26, 27.

WITHERS *v.* GENERAL THEATRE CORPORATION, LIMITED.

[1931. W. 2456.]

Contract—Theatrical Engagement—Construction—Breach—Damages—Loss of Publicity—Option as to Hall at which Actor should appear—Misdirection of Jury.

The plaintiff, who was a variety artiste, was engaged by the defendant company to appear and perform a certain sketch at the London Palladium for three consecutive weeks, commencing July 6, 1931, at a gross salary of 300*l.* per week, he providing the supporting actors and properties. The contract contained a clause by which the plaintiff agreed, should the defendants so desire, to transfer the engagement to any hall owned, controlled by or associated with the defendants either in London or the provinces. The plaintiff had a preliminary trial week at Portsmouth, and after viewing a performance there the defendants on July 2, 1931, gave the plaintiff notice that they would not allow him to perform at the London Palladium under the agreement. The plaintiff sued the defendants claiming damages for breach of contract, including loss of publicity and reputation. At the trial counsel for the plaintiff suggested to the jury that the plaintiff had thereby suffered damage to his reputation. The judge in summing up the case told the jury that they must put some figure upon the loss of publicity because the plaintiff was not allowed to perform at the Palladium. He did not refer in his summing-up to the option in the contract. The jury returned a verdict for the plaintiff for the salary he had lost and 1000*l.* for loss of publicity. On appeal by the defendants:—

Held, that damage to a reputation already existing by not allowing an actor to appear in accordance with his contract was not a matter which could be taken into consideration by a jury in assessing damages for breach of contract. What had to be taken into consideration was whether if the actor had been allowed to appear that appearance would have given him an enhanced reputation. That distinction had not been explained to the jury by the judge, and therefore there would have to be a new trial on the question of damages.

Statement of Bankes L.J. in *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ld.* [1928] 1 K. B. 269, 281, that a jury might award a plaintiff compensation for damage to reputation already acquired, dissented from.

Herbert Clayton & Jack Waller, Ld. v. *Oliver* [1930] A. C. 209 explained and followed.

Held, further, by Scrutton and Romer L.JJ., that the plaintiff had under the contract no absolute right to appear at the Palladium; that the defendants had an option as to the halls at which he should appear; that in assessing damages for the breach of a contract which the defendants could at their option perform in alternative ways it must be assumed that the defendants would perform it in the way most beneficial to themselves and not in the way that would be most beneficial to the plaintiff; and that as there had been no direction by the judge with regard to this there must be a new trial on this ground also.

Cockburn v. *Alexander* (1848) 6 C. B. 791, 814 and *Robinson* v. *Robinson* (1851) 1 D. M. & G. 247, 257 followed.

APPEAL from a judgment of the Lord Chief Justice on a trial with a special jury.

The plaintiff, Withers, was a variety artiste and performer, who had a sketch which depended very largely upon the plaintiff's skill as an actor. He was practically the only actor in the piece, and the success of the sketch depended on the exact timing of a number of properties, including other artistes, with the acting of the plaintiff. Unless the properties were exact and the artistes timed their acts exactly the piece would be a disastrous failure. The plaintiff had been in England before with a similar sketch, and had had a great success, and in consequence he continued his success in the United States when he returned there. After a considerable interval of time the plaintiff desired to come to England, and the defendant company, which controlled the Palladium and other theatres, was ready to engage him.

The contract between the plaintiff and the defendant company, which was dated June 19, 1931, provided that he should appear and perform his sketch at the London Palladium for three consecutive weeks commencing July 6, 1931, at a gross salary of 300*l.* per week, he providing the supporting actors and properties. On the margin of the printed contract was the following clause, initialled by the plaintiff: "In consideration of this agreement it is understood and agreed that notwithstanding anything in this agreement to the contrary, should the management so desire, the artiste agrees to transfer these engagements to any hall owned, controlled by, or associated with the management either in London or the provinces without charging transfer expenses." During the negotiations the plaintiff was told by the defendants: "We may give you two weeks at the Palladium and one week at another hall. This will, of course, depend on how you stand up at the Palladium during the first two weeks."

The plaintiff did not wish to start at once at the Palladium with a company which he engaged in England, as it required considerable rehearsal to get the sketch to work neatly and to time. He accordingly asked to have a preliminary trial week at Portsmouth at a considerably lower salary. He started on the week's performance at Portsmouth, and on the Monday the performance went all wrong: the properties did not work at the right time, and the supporting artistes did not work with the properties at the right time. On Wednesday, July 1, the Palladium authorities went down to Portsmouth and saw the performance, and came to the conclusion that the sketch would not be in a fit state to be performed at the Palladium on the following Monday, and they communicated their decision to the plaintiff, who protested. On July 2, 1931, the defendants gave the plaintiff written notice that they did not intend to allow him to perform at the London Palladium under the agreement.

The plaintiff thereupon brought the present action, claiming that by reason of the defendants' breach and repudiation of the contract he had sustained loss and damage, including loss of publicity and reputation as a variety artiste and performer.

The defendants alleged that the plaintiff agreed on Wednesday, July 1, that his sketch would not be in a fit state to appear at the Palladium on the following Monday. The plaintiff denied that he so agreed, and the jury found that he did not agree.

No question was left to the jury whether the plaintiff was ready and willing to produce on Monday, July 6, at the Palladium the sketch in such a condition that it was fit to appear at a high class place of entertainment like the Palladium.

It was agreed that the plaintiff's expenses were 75*l.* per week, and that his net profit would therefore be 225*l.* per week.

Counsel for the plaintiff in his final speech to the jury said: "Members of the jury, does it do a man any good to be turned out of the greatest hall in England? If the accurate and quiet, sober truth is told about it, what good does it do, and what harm does it do him? Do you think that everybody who discusses this matter in England and America will confine themselves to the strict and accurate truth? It will be known that the show was a failure and that the show was not put on at the Palladium."

The Lord Chief Justice in his summing-up to the jury said: "No doubt it is a serious matter if it is known that an artiste is expected to appear and does not appear at a well known music-hall like the Palladium, and you would have to put some figure upon that loss of publicity." He did not allude to the fact that the defendants had under their contract an option as to the halls at which the plaintiff should appear.

The jury returned a verdict for the plaintiff for 675*l.* loss of profit for three weeks and 1000*l.* for loss of publicity.

The defendants appealed.

Sir Patrick Hastings K.C. and *Van Breda* for the appellants. The appeal of the defendants is as to the sum of 1000*l.* awarded to the plaintiff for loss of publicity. The law as defined in *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ld.* (1), and *Herbert Clayton & Jack Waller, Ld.* v. *Oliver* (2), is that if an actor or artiste is, in breach of his contract, not allowed to appear at a particular theatre or music-hall by the management he is entitled to recover, not merely for the loss of the salary he would have earned, but also damages for the loss of reputation which he would have acquired if he had been allowed to appear. But he cannot recover damages for injury to a reputation which he has already acquired. That would be contrary to *Addis* v. *Gramophone Co.* (3), where Lord Loreburn L.C. said (4): "If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment." The general rule is that damages for wrongful dismissal, like any other breach of contract, are limited to the plaintiff's direct pecuniary loss. Lord Buckmaster stated what it was competent for the jury to consider in assessing damages in the following terms in *Clayton & Waller, Ld.* v. *Oliver* (1): "In assessing the damages, therefore, it was competent for the jury to consider that the plaintiff was entitled to compensation because he did not appear at the Hippodrome, as by his contract he was entitled to do, and in assessing those damages they may consider the loss he suffered (1.) because the Hippodrome is an important place of public entertainment and (2.) that in the ordinary course he would have been 'billed' and otherwise advertised as appearing at the Hippodrome. The learned judge puts the matter as a loss of reputation, which I do not think is the exact expression, but he explained that as the equivalent of loss of publicity and that summarizes what I have stated as my view of the true situation." Counsel for the plaintiff in his final speech to the jury suggested to the jury that damages might be given to the plaintiff for the injury which had been done to the reputation he already had through his not being allowed to appear at the Palladium, and the Lord Chief Justice in summing up the case misdirected the jury, because he either adopted Mr. Doughty's view of the law, or in any event he did not warn the jury against accepting that view of the law.

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(1) [1928] 1 K. B. 269.
(2) [1930] A. C. 209.
(3) [1909] A. C. 488.
(4) Ibid. 491.

Further, the plaintiff was not entitled to appear at the Palladium, because the contract contains a clause under which the plaintiff agreed "to transfer these engagements to any hall owned, controlled by, or associated with the management either in London or the provinces." The defendants might, therefore, without any breach of contract, have transferred the plaintiff to one of their halls in the provinces where he would not have obtained such publicity as he would if he appeared at the Palladium. The rule is that where a contract can be performed in more than one way, that mode is adopted which is the least profitable to the plaintiff and the least burdensome to the defendant: *Robinson* v. *Robinson* (1); *Cockburn* v. *Alexander* (2); *Kaye Steam Navigation Co.* v. *Barnett.* (3) The plaintiff's whole case was that he was entitled to appear at the Palladium and nowhere else, his counsel gave no effect whatever to the option clause in the contract, and the Lord Chief Justice omitted altogether to refer to the option clause in his summing-up. There ought to be a new trial by reason of the misdirection.

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(1) [1930] A. C. 220.

Doughty K.C. and *F. W. Beney* for the respondent. This was a contract for a performance at the London Palladium and nowhere else. The plaintiff could only perform his part of the contract by appearing there. It is true that under the contract the defendants had the right to give the plaintiff notice to appear at some other hall, but until that notice of variation was given the plaintiff's contract was to appear at the Palladium. At the time the contract was broken by the letter of July 2 it was a contract for the plaintiff to play at the Palladium and nowhere else. The fact that that option at the volition of the defendants existed does not make the damages for a breach of the contract incapable of assessment: *Chaplin* v. *Hicks* (4); *Sapwell* v. *Bass.* (5) The contract did not contain alternative methods of performing it, but an opportunity to vary it. What counsel says in his address to the jury ought not to be scanned too meticulously. Lord Loreburn, in stating the rule as to damages for wrongful dismissal in *Addis* v. *Gramophone Co.* (6), was speaking of the ordinary relationship of master and servant. That rule only partially applies in a case where the artiste who is engaged to appear at a theatre or music-hall is going to be billed. Lord Buckmaster in *Clayton & Waller, Ld.* v. *Oliver* said (7): "Both parties knew that as flowing from the contract the plaintiff would be billed and advertised as appearing at the Hippodrome, and in the theatrical profession this is a valuable right."

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(1) 1 D. M. & G. 247, 257.

(2) 6 C. B. 791, 814.

(3) (1932) 48 Times L. R. 440.

(4) [1911] 2 K. B. 786.

(5) [1910] 2 K. B. 486.

(6) [1909] A. C. 491.

(7) [1930] A. C. 220.

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If there is a special contract and a right to be billed, damages may be given for breach of the contract which will not be limited to loss of salary. In *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ld.*, Bankes L.J. said (1): "Now there were special circumstances, well known to the defendants, attending the making of this contract, among them a collateral agreement which was of particular importance to the plaintiff . . . . on the other hand it is clear that there was a collateral agreement that the plaintiff should be prominently advertised and that she only entered into the principal contract on condition that the defendants would comply with her requirements in this respect. . . . . Then how far does the existence of this collateral contract affect the damages? In my opinion it is sufficiently established that where there has been a breach of a contract to employ an actress, whose reputation depends on the continued and successful practice of her art, and where the engagement is accompanied by promises of wide-spread publicity and advertisement which will probably lead to future opportunities following on successful performance, the Court recognizes that the damages for that breach may properly include such a sum as a jury may award to compensate the plaintiff for the loss of the reputation which would have been acquired, or damage to reputation already acquired, or, to use another expression, for loss of publicity." Atkin L.J. also said the same thing. He said (2): "The defendants . . . . admit that to be advertised as about to appear and to be prevented at the last moment from appearing would be disastrous to the reputation she wished to acquire, and her existing reputation may also be considered." Therefore both Bankes and Atkin L.JJ. thought that in assessing damages the injury done to a reputation already acquired might be taken into consideration. The House of Lords in *Oliver's* case (3) did not distinguish *Marbe's* case. (4) Indeed, Lord Dunedin said he thought *Marbe's* case (4) was rightly decided. It would be very

(1) [1928] 1 K. B. 279, 280, 281.
(2) Ibid. 288.
(3) [1930] A. C. 209.
(4) [1928] 1 K. B. 269.

strange if the House of Lords in *Oliver's* case (1) intended to decide that what Bankes and Atkin L.JJ. said in *Marbe's* case (2) was wrong without expressly saying so. The statement by Lord Buckmaster in *Oliver's* case (3): "The learned judge put the matter as a loss of reputation, which I do not think is the exact expression, but he explained that as the equivalent of loss of publicity and that summarizes what I have stated as my view of the true situation," does not overrule what was said in *Marbe's* case. (2) The case of an actor is different from the ordinary case of master and servant. *Addis* v. *Gramophone Co.* (4) does not apply to the loss of reputation of an artiste or actor in a theatrical case. The rule that ought to be applied to such cases is the rule in *Hadley* v. *Baxendale.* (5)

Sir Patrick Hastings K.C. replied.

SCRUTTON L.J. This is a case of some difficulty, and I have felt during the argument some doubt as to the proper course to take. The case is one of assessment of damages for loss of publicity by an actor, and since the doctrine that damages may be given for loss of publicity was stated in *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ld.* (6), and confirmed by the House of Lords in *Clayton & Waller, Ld.* v. *Oliver* (1), there is no doubt that juries have regarded such damages in a way which the Courts do not altogether approve. In *Clayton & Waller, Ld.* v. *Oliver* (3) Lord Buckmaster thought the damages which the jury had given were extravagant just as they were in *Marbe's* case (6), but not so extravagant as to vitiate the verdict. The Court of Appeal in *Marbe's* case (6) were in some doubt whether or not the damages for loss of publicity did not exceed what a jury acting as reasonable persons might award. The difficulty of the subject-matter is further shown by the fact that Lord Buckmaster in *Clayton & Waller, Ld.* v. *Oliver* (7) thought that the case might have been more carefully handled at the

(1) [1930] A. C. 209.
(2) [1928] 1 K. B. 281, 288.
(3) [1930] A. C. 220.
(4) [1909] A. C. 488.
(5) (1854) 9 Ex. 341, 354.
(6) [1928] 1 K. B. 269.
(7) [1930] A. C. 221.

trial. It is a difficult subject-matter to deal with. One is very reluctant to order new trials, but after considering the arguments put before us I have come to the conclusion that there has not been a satisfactory trial of this case as to damages, or a satisfactory direction by the learned judge. I do not think it is a case for dealing with the matter by entering judgment for the defendants upon the question of loss of publicity, or rather by striking out of the judgment for the plaintiffs the damages awarded for loss of publicity; but I think it is a matter which on the issue of damages alone, and on no other issue, requires a new trial.

I will deal first of all shortly with the facts; secondly, with the law as established by the authorities; and, thirdly, with the course of the trial. The facts as I understand them are these: [His Lordship, having stated the facts substantially as set out above, continued:] Sir Patrick Hastings did not dispute that having regard to the verdict he must admit that there was a breach of contract, and he confined his objection to that portion of the verdict against the defendants which awarded the plaintiff 1000*l.* for loss of publicity. He says that counsel for the plaintiff asked the jury to give damages (1.) on the basis that there was a contract binding the defendants to let Mr. Withers appear at the Palladium; and (2.) that by not being allowed to appear at the Palladium Mr. Withers lost his reputation. He had, to use Mr. Doughty's phrase, been turned out of the Palladium, and had lost his reputation by that action of the defendants. Sir Patrick Hastings says, first, that if he is right that there was no binding contract to allow Withers to appear at the Palladium, the plaintiff has given no evidence of any loss of reputation or loss of publicity that would have followed through his appearing, in accordance with a clause in the contract, at some of the other halls of the defendant company at which, under the clause of the contract I have referred to, Sir Patrick Hastings says the defendants had a right to require him to perform. Sir Patrick Hastings says, secondly, that counsel for the plaintiff asked the jury to give damages for the loss of reputation which he sustained

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by being turned out of the Palladium, and that the judge did not give the jury any direction as to the way in which they were to assess the damages for the admitted breach of contract.

It is a little ironical that Sir Patrick Hastings, who has had a great deal to do with shaping this doctrine of damages for loss of publicity, should now be the person who is complaining of its operation. The law stands in this way: speaking generally, in actions for wrongful dismissal and for wrongfully not allowing a service to be performed, damages are only given for the pecuniary loss thereby sustained, and the damages cannot include compensation for the manner of the dismissal, for the dismissed man's injured feelings, or for the loss that he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment—that is to say, for the fact that a dismissed man may find it more difficult to get employment in the future. That is the language of the headnote in *Addis* v. *Gramophone Co.* (1), and I think it exactly represents the judgment of Lord Loreburn, who gave a considered judgment in that case.

In 1927 came the case of *Marbe* v. *George Edwardes (Daly's Theatre), Ld.* (2) Miss Marbe had been offered a contract to appear in a play, with a collateral contract to advertise her. She was not allowed to appear in the play, and she claimed damages for breach of contract and damages because she had not had the opportunity of appearing in the play and had lost her reputation thereby. The jury in that case gave the plaintiff 3000*l.* damages for loss of publicity, and Lord Buckmaster in *Clayton & Waller, Ld.* v. *Oliver* (3) thought the damages were extravagant. All the members of the Court of Appeal in *Marbe's* case (2) were agreed that the amount of damages awarded was very heavy, but the point for consideration was whether the damages were so excessive that a new trial ought to be granted. Bankes L.J. expressed himself in this way as to the damages that should be

(1) [1909] A. C. 488.
(2) [1928] 1 K. B. 269.
(3) [1930] A. C. 209, 220.

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given (1): "In my opinion it is sufficiently established that where there has been a breach of a contract to employ an actress, whose reputation depends on the continued and successful practice of her art, and where the engagement is accompanied by promises of widespread publicity and advertisement which will probably lead to future opportunities following on successful performance, the Court recognizes that the damages for that breach may properly include such a sum as a jury may award to compensate the plaintiff for the loss of the reputation which would have been acquired, or damage to reputation already acquired, or, to use another expression, for loss of publicity." That statement appears to me to contemplate two classes of damage: (1.) the actress looks forward to a reputation which she will get by appearing in the play, and she claims that the defendants have deprived her of that opportunity of acquiring the reputation; (2.) the actress already has a reputation which is damaged by the defendants saying that they will not allow her to perform in the play after having engaged her to do so. Those appear to me to be two distinct classes of damage or two distinct classes of loss of reputation.

Marbe's case (2) was regarded as a very important case to theatrical managers and actors and artistes, and another case, *Clayton & Waller, Ld.* v. *Oliver* (3), was taken to the House of Lords in order to obtain a decision whether *Marbe's* case (2) had been rightly or wrongly decided. As I read the judgment in *Clayton & Waller, Ld.* v. *Oliver* (3) the House of Lords thought that Bankes L.J.'s statement in *Marbe's* case (1) had gone too far, and therefore, as Lord Dunedin said (4) in *Oliver's* case: "The exact words in which" Lord Buckmaster "expressed what it was competent for the jury to consider were agreed on after consultation between all the noble Lords who heard the case." Lord Buckmaster considered that these theatrical contracts are something more than a mere contract on the actor's part to

(1) [1928] 1 K. B. 281.
(2) Ibid. 269.
(3) [1930] A. C. 209.
(4) Ibid. 221.

render service: opportunity for such service is contemplated and agreed to be furnished. He said (1): "It is clear that the great object of any gentleman wishing to become a distinguished actor, when he has already established a reputation in the provinces, is to have an opportunity of appearing upon the London stage and before a London audience. That is the object for which a person enters into a contract of this description, and it would be defeated if the effect of the contract is this: that if the gentleman who engaged him is not bound to employ him, and does not in fact do so, so as to give him an opportunity to display his talent and abilities, yet he is not to be at liberty to act elsewhere, unless by the permission of the gentleman who engaged him." Having laid that down as a general rule he adds (2): "What are known as vindictive or exemplary damages in tort find no place in contract." It had been agreed, after consultation between the five noble Lords who heard that case, that in assessing damages "it was competent for the jury to consider that the plaintiff was entitled to compensation because he did not appear at the Hippodrome, as by his contract he was entitled to do, and in assessing those damages they may consider the loss he suffered (1.) because the Hippodrome is an important place of public entertainment and (2.) that in the ordinary course he would have been 'billed' and otherwise advertised as appearing at the Hippodrome." Lord Buckmaster went on to say: "The learned judge put the matter as a loss of reputation, which I do not think is the exact expression, but he explained that as the equivalent of loss of publicity and that summarizes what I have stated as my view of the true situation." Now I take that to be the considered judgment of the House of Lords. Damage to a reputation already existing by not allowing an appearance is not a matter which can be considered, but what has to be considered is whether, if the actor had been allowed to appear, that appearance would have given him publicity, and whether he has been deprived of that opportunity of appearing. That

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(1) [1930] A. C. 217.

(2) Ibid. 220.

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I take to be the law, and it is quite certain that that distinction, somewhat difficult to explain, but important in assessing damages in these publicity cases, was not explained to the jury at all by the learned judge.

The contract contained a clause which gave an option to the defendants either to require Mr. Withers to appear at the Palladium or to require him to appear for three weeks at the same salary at any other hall they control, and therefore, if the case has been tried, and has been left to the jury, on the assumption that, whatever the defendants say, Mr. Withers has a right against them to appear at the Palladium whether they wish it or not, it has, in my opinion, been left to the jury on the wrong basis, because it is a contract under which the defendants have an option either to require Mr. Withers to appear at the Palladium or to transfer his services to one or other of the halls which they control, which include some important halls in large towns and some halls in subordinate towns. Mr. Doughty very properly called our attention to the fact that, while matters were in negotiation, Mr. Withers was told : "We may give you two weeks at the Palladium and one week at another hall. This will, of course, depend on how you stand up at the Palladium during the first two weeks." That is to say, I suppose, that the matter depends upon how his performance went at the Palladium. Therefore it is quite clear that the contract is not a contract under which Mr. Withers has an absolute right to appear at the Palladium, it is a contract under which the defendants have an option to require the plaintiff to transfer the engagement to some other hall which they control.

Now where a defendant has alternative ways of performing a contract at his option, there is a well settled rule as to how the damages for breach of such a contract are to be assessed. One takes it as expressed in Chancery in *Robinson* v. *Robinson* (1) as follows: "Where a man is bound by covenants to do one of two things, and does neither, there in an action

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(1) 1 D. M. & G. 247, 257.

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by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee." At common law Maule J. expressed it in *Cockburn* v. *Alexander* thus (1): "Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant." A very common instance explaining how that works is this: A. undertakes to sell to B. 800 to 1200 tons of a certain commodity; he does not supply B. with any commodity. On what basis are the damages to be fixed? They are fixed in this way. A. would perform his contract if he supplied 800 tons, and the damages must therefore be assessed on the basis that he has not supplied 800 tons, and not on the basis that he has not supplied 1200 tons, not on the basis that he has not supplied the average, 1000 tons, and not on the basis that he might reasonably be expected, whatever the contract was, to supply more than 800 tons. The damages are assessed, as Maule J. says, on the basis that the defendant will perform the contract in the way most beneficial to himself and not in the way that is most beneficial to the plaintiff. The last case that Sir Patrick Hastings referred to was *Kaye Steam Navigation Co.* v. *Barnett* (2), where there was an option as to the port of discharge, and Branson J., following and citing *Robinson* v. *Robinson* (3), in effect says that it must be assumed that the defendant exercised the option in the way in which it would have been most beneficial to himself and not in the way which woulb have been most beneficial to the plaintiff. Those two cases appeal to my mind because they both happen to have been cases of charterparties, but Romer L.J. says the case which appeals to him is that of a lease for seven, fourteen or twenty-one years which is wrongfully determined at the end of five years by the landlord. On what basis are damages to be assessed? Answer: On the basis that the landlord can determine the lease in seven years, and therefore the plaintiff can only recover damages on the assumption that he had only two more years of the lease to run.

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(1) 6 C. B. 791, 814.

(2) 48 Times L. R. 440.

(3) 1 D. M. & G. 247.

There is no explanation whatever by the learned judge or reference by counsel for the plaintiff to the way in which that measure of damage should be worked out. Counsel for the defendants twice called the attention of the learned judge to the marginal clause which gives the option to the defendants. Unfortunately there was no direction by the learned judge at all with regard to that option. Mr. Doughty says that inasmuch as the management has not in fact exercised the option that clause can have no effect. As some of the earlier cases show, it is not what in fact happens but what might happen, as the performance of the contract by the defendant, that is to decide the matter.

I have read the shorthand notes of the proceedings, and it is clear that the jury from the commencement were given erroneous views as to the way in which they ought to deal with the question of damages. When Mr. Doughty opened the case he began in this way: he asked the jury to give the plaintiff "a substantial sum for damages for the loss of publicity, as it is called. It is not an injury to his reputation, but the loss of publicity, the loss of the commercial value of his act through his being turned down." Now that expression seems to me to be thoroughly misleading; to suggest that a man has suffered loss of reputation because he has been dismissed is just the thing which, as I understand, the House of Lords in *Clayton & Waller, Ld.* v. *Oliver* (1) objected to in the language of Bankes L.J. in *Marbe's* case. (2) At a further stage in Mr. Doughty's argument he said what, I think, he now admits to be inaccurate, although he says it was merely a rhetorical inaccuracy, and therefore does not matter; he said that the plaintiff might reasonably have expected that he would be allowed to perform at the Palladium, and therefore he must be given damages on the basis that his reasonable expectation was not fulfilled. That is not, as I understand it, the principle in regard to the

(1) [1930] A. C. 209.

(2) [1928] 1 K. B. 269, 281.

measure of damages which has been laid down, which, indeed, I understand Mr. Doughty now admits. A jury ought not to be asked to award damages on what the plaintiff might have expected, but they ought to have been told that the question was what would be the most beneficial performance of the contract to the defendants, and that the damages could not exceed a basis calculated upon that; that they could not be based upon a performance of the contract that would be most beneficial to the plaintiff, and certainly not upon a performance which he might reasonably expect.

Now that being the inaccuracy, as it seems to me, in the plaintiff's presentation of the case, the defendants' counsel having twice called the attention of the judge to the clause in the contract giving the defendants an option, the learned judge summed up the case. I think it is quite obvious on reading his summing-up that he thought it was very doubtful whether the plaintiff ought to have a verdict at all. He speaks of that as being the major point, and deals with the question of damages first in very short language. He says this: "The defendants engaged the plaintiff and his company to appear and perform at the London Palladium." That, in my view, misstates the contract. The contract is to perform at the London Palladium or such other halls as the defendants may desire. The learned judge goes on: "No doubt it is a serious matter if it is known that an artiste is expected to appear and does not appear at a well known music-hall like the Palladium, and you would have to put some figure upon that loss of publicity." That seems to me to be the matter which Bankes L.J. in *Marbe's* case (1) mentioned as the loss of reputation already acquired, because the actor is not allowed to perform, and it is a matter which in my view the House of Lords in *Clayton & Waller, Ld.* v. *Oliver* (2) intended to exclude by their carefully settled statement as to what it was competent for a jury to consider in assessing damages. I entirely appreciate that, even if proper directions as to the measure of damages, following the decision of the House of Lords, had been given to the jury, one does not know what would have happened. But the fact is that the jury cannot have understood the difference which I have endeavoured to state carefully, because they received no direction at all with regard to what I agree is a difficult matter to explain to a jury, but on which we have the guidance of the House of Lords as to what should be explained to the jury. I do not think the jury were given a chance of considering it. Supposing the defendants had said that they did not propose to allow the plaintiff to perform at the Palladium, they proposed to give him three weeks at the contract salary at three other allied halls; the jury were not told that they would have to consider what would be the effect on the loss of publicity of the plaintiff's performance at three minor halls and not at the Palladium. In those circumstances I have come to the conclusion, seeing that the verdict of 1000*l.* for loss of publicity is a verdict for the same amount as was given in *Oliver's* case (1), where the House of Lords said the damages were extravagant, and seeing that no explanation was given as to the proper measure of damages, or to the option to which the defendants' counsel twice called the attention of the judge, there must be a new trial on the question of damages only.

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(1) [1928] 1 K. B. 269, 281.

(2) [1930] A. C. 209, 220.

I do not think it is a case for a judgment for the defendants on this point, by which I understand Sir Patrick Hastings to mean the striking out of the judgment the sum of 1000*l.* awarded for loss of publicity. I do not think it is a case for that, because the jury might very well say that they could judge what the difference in publicity value would be between an appearance at the Palladium and an appearance, say, at Penge. I do not think it is a case in which one could say there is no evidence on which the jury could come to a determination on that matter, but they received no explanation of what they had to do at all, and in those circumstances I am afraid there must be a new trial, limited to a claim for damages for breach of contract other than the claim for net salary, as to which there is no complaint.

(1) [1930] A. C. 209, 220.

GREER L.J. I agree there must be a new trial in this case. I am not sure that I agree that the defendants are entitled to a new trial on both grounds put forward by Sir Patrick Hastings. He said there was a misdirection in this case: firstly, because the learned judge treated this agreement as an agreement to be performed at the Palladium; and, secondly, because there was an inaccurate direction as to what damages can be recovered on the ground of loss of publicity.

With regard to the first ground, I think it is unnecessary to decide it. I am rather impressed with the view put forward by Mr. Doughty that this is prima facie an agreement to employ the defendant at the Palladium, with a condition that in a certain event he shall agree that his engagement to perform at the Palladium shall be changed into an engagement to perform at some other of the music-halls under the control of the defendants. The breach of contract here happened before the day for the commencement of his engagement arrived. The question is: What loss of publicity did the plaintiff suffer by reason of that breach at that time of the agreement? I am inclined to think the jury were entitled to say, if they had been adequately directed: "We are satisfied that if the agreement, which was wrongly broken in anticipation on July 2, had been allowed to continue, the prima facie obligation for the plaintiff to appear at the Palladium would be still in operation, and there would not have been any expression or desire on the part of the defendants that the plaintiff should appear at one or other of the halls they control." I think the facts seem to indicate that if the jury had found that that was their view of the facts, they would have found it in accordance with the probabilities of the case; that is to say, if the agreement had not been broken it would have been carried out in its prima facie meaning—namely, an agreement to perform at the London Palladium for the three weeks mentioned in the schedule.

Be that as it may, I am satisfied that there was not in this case—and I can quite understand why—a sufficient explanation to the jury in the summing-up by the learned judge of the measure of damages with regard to the item of loss of

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publicity. It is a very difficult task to put into words what exactly is the limitation which ought to be put upon the liability of defendants in the position of these defendants to pay for loss of publicity, but it must be done, otherwise the jury may be led to believe that they can give any damages they like —namely, damages for loss of an existing reputation arising out of the breach of contract, and also damages for loss of publicity.

I take it to be common ground that for a breach of contract, other than a contract to do work as an artiste, either in a theatre or music-hall, the damages are limited to the pecuniary loss arising from the breach of contract; and however clear it may be that the person whose contract has been broken suffers general damages for loss of reputation he cannot get anything in respect of that loss from a jury. This does not merely apply to contracts of employment, it applies to most contracts. One can perfectly well understand that such a contract, for example, as a building contract might be broken at a time and in such circumstances as would have very serious results upon the reputation of the builder, who might be financially damaged to a very great extent; but all he can recover is what he would have been paid for his work, less the expense of doing it, if the performance of the agreement had been continued.

There is an exception to this rule, and that is with regard to an agreement by an artiste who engages to perform at a theatre or music-hall, and I understand the exception has this effect: When a proprietor of a music-hall or theatre engages an artiste to perform, he is promising two things: he is giving a consideration which consists of two different elements; firstly, a salary which he promises the artiste for his services, and secondly, the opportunity to play in public some part which will attract attention. For the loss of his salary the artiste is entitled to damages if his contract is broken. For the loss of the opportunity of impressing the public with his artistic value and so enhancing or maintaining his reputation, he is also entitled to recover damages: but he is not entitled to recover damages such as Mr. Doughty, in his address to the jury, asked them to give. In Mr. Doughty's final speech he said: "Members of the jury, does it do a man any good to be turned out of the greatest hall in England? If the accurate and quiet, sober truth is told about it, what good does it do, and what harm does it do him? Do you think that everybody who discusses this matter in England and America will confine themselves to the strict and accurate truth? It will be known that the show was a failure and that the show was not put on at the Palladium." I think that such a claim goes a long way beyond anything that would be justified by any accurate description of loss of publicity, and the learned judge's summing-up, coming as it did almost immediately after the address by Mr. Doughty for the plaintiff, was in one respect subject to criticism, and that is that the statement about the damages was too short, and did not correct the impression that must have been made by the powerful oration that the plaintiff's counsel had just finished addressing to the jury. All that the learned judge said about it is in these words: "No doubt it is a serious matter if it is known that an artiste is expected to appear and does not appear at a well known music-hall like the Palladium, and you would have to put some figure upon that loss of publicity." If that had been a little further expounded and explained, no exception could be taken to it, but I think the defendants are entitled to criticize it in that it was too brief, and did not contain the explanation which was necessary after the decision of the House of Lords in *Clayton & Waller, Ld.* v. *Oliver* (1) as to the extent of the defendants' liability to damages for the loss of publicity.

On that ground I think this Court, though with some reluctance, must order a new trial. I can quite understand the learned Lord Chief Justice, having dealt with the matter as he did, thought that the real matter before him was the question of liability, and not the question of damages for loss of publicity, although that had also to be dealt with.

I agree that this verdict should be set aside so far as the damages are concerned, and a new trial ordered as regards damages.

(1) [1930] A. C. 209.

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ROMER L.J. I agree that there must be a new trial on the issue as to damages. Mr. Doughty said, and I think very rightly, that in a case like this one ought not to criticize and examine too meticulously the observations made by counsel or the summing-up of the learned judge, and I disclaim any intention of doing so. But looking at the matter broadly I have come to the conclusion that it never was brought to the minds of the jury that the plaintiff was not entitled to recover damages for his loss of reputation; that is to say, the damage his reputation may have suffered by the repudiation of the contract with the defendants, as distinct from the damage he has sustained by reason of the loss of opportunity of enhancing his reputation by appearing under the terms of his contract; nor do I think it was sufficiently brought home to the minds of the jury that the defendants were not under any obligation to employ the plaintiff at the Palladium; but that they had the option of employing him elsewhere within certain limits mentioned in the contract.

In my opinion a new trial should be ordered upon both those grounds. As to the first I do not desire to add anything to what has been said about the law and the facts. As to the second, I only wish to say this: It must be observed that at the time the defendants repudiated the contract on July 2, they had not lost the right of exercising the option which in my opinion they had under the contract of directing the plaintiff to appear, not at the Palladium but at one of the other halls belonging to or under the control of the defendants; and the jury ought to have taken into consideration the possibility, and I think the probability, that if the defendants instead of repudiating the contract on July 2 had elected to go on with the performance they would have sent the plaintiff to perform somewhere else than at the Palladium.

For these reasons I think there must be a new trial.

New trial on question of damages.

Solicitors for appellants: *Lawrance, Messer & Co.*

Solicitors for respondent: *Kenneth Brown, Baker, Baker.*

R. F. S.

LEWIS *v.* COMMISSIONERS OF INLAND REVENUE.

K. B. D.
1933
Jan. 16, 17.
C. A.
July 6.

Revenue—Super-tax—Partner—Share of Profits of a Partnership Business—Method of assessing Partner to Super-tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 20.

For the purpose of an assessment to super-tax of a partner under s. 20 of the Income Tax Act, 1918, his income from the profits of the partnership is to be ascertained by dividing among the partners the income of the firm assessable to income tax under Sch. D for the preceding year, and the division is to be made, first, by allocating to each partner any salary, commission, or interest on capital to which he is entitled for the year of assessment, and, secondly, by dividing the balance of that income among the partners in the proportion provided by the partnership deed.

Gaunt v. *Inland Revenue Commissioners* [1913] 3 K. B. 395; 7 Tax Cas. 219 approved and applied.

So *held* by the Court of Appeal (Lord Hanworth M.R. and Lawrence L.J.; Slesser L.J. *dub.*), confirming the decision of Finlay J.

Case stated under the Income Tax Act, 1918, s. 7, sub-s. 6, and s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 8 and December 17, 1931, E. R. Lewis (hereinafter called "the appellant") appealed against assessments to super-tax made upon him for the years 1927–8 and 1928–9 in the sums of 6468*l.* and 23,666*l.* respectively.

The appellant was a partner in the firm of Hichens, Harrison, Woolston & Co. from January 1, 1927, to January 31, 1928, and there was included in the computation of the said assessment for 1927–8 the sum of 5887*l.* in respect of the three months January to March, 1927, and in the computation of the said assessment for 1928–9 the sum of 18,203*l.* in respect of the ten months April, 1927, to January, 1928, as representing the appellant's share in the profits of the said firm. It was to these sums of 5887*l.* and 18,203*l.* only that this appeal related.

The relations between the partners in the said partnership firm of Hichens, Harrison, Woolston & Co. were regulated by the terms of a draft deed of partnership which though never executed, was in fact agreed to be binding and acted upon in matters material to this case. The parties to the draft deed were Leonard Frederic Harrison, Herbert Edgar West, John Brandon, the appellant, and Michael Lawrence Harrison, and its most important provisions for the present purpose were as follows :—

"4. The initial capital of the partnership shall consist of the sum of 20,000*l.* to be brought in by Mr. Harrison and Mr. West in equal shares and each of them shall be entitled to receive interest at the rate of 5*l.* per centum per annum payable half-yearly from the commencement of the partnership on the amount of capital so brought in by him as aforesaid or so much thereof as shall not have been withdrawn. . . . . Mr. Harrison and Mr. West shall while they respectively remain partners in the firm lend to the partnership securities of the value of 25,000*l.* each. Any partner (with the consent of the other partners) securities to the partnership . . . . shall be credited (in addition to receiving the income dividends and rights from such securities) with 1*l.* per centum per annum withdrawable half-yearly on the value aforesaid of the said securities while they shall be so lent. . . . .

5. Each of Mr. Brandon, Mr. Lewis and Mr. Harrison, Junior, shall be entitled to be paid (whether the transactions of the business in any year result in a profit or not) an amount equal to the aggregate of (*a*) one half of the commission earned and received by the firm in such year on investment business introduced by such partner and (*b*) 45 per cent. of the profits (if any) made and received by the firm in such year on any other business introduced by such partner. . . . . Commission payable to a partner shall be treated as outgoings of the partnership in the year in which they are paid.

16. In taking the accounts of the partnership actual receipts only shall for the purpose of determining the profits or losses of the partnership during the year be taken into account but all expenses and outgoings incidental to the carrying on of the said business . . . . and all losses and damages incurred in connection with the said business and the interest payable to the partners on their capital or on loans or in respect of

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the loan of securities and the commission payable to a partner in respect of the year shall be deducted from the receipts in order to arrive at the amount of profit or loss for the year. For the purposes of the balance-sheet of the partnership due allowance shall be made for depreciation and recouping lost capital and a just valuation shall be made of any items which in the opinion of the accountants shall require valuation.

17. Out of the profits earned by the partnership during any year as appearing in the profit and loss account of the partnership for such year there shall first be paid to each partner (if sufficient profits be available) up to the sum of 1250*l.* Any surplus of the said profits shall if the total amount of the profits before deducting income tax does not exceed 23,095*l.* be divided between Mr. Harrison and Mr. West in the proportion of $42\frac{3}{4}$ per centum to Mr. Harrison and $57\frac{1}{4}$ per centum to Mr. West. If the profits before deducting income tax shall exceed 23,095*l.* then 23,095*l.* part thereof shall be divided in manner hereinbefore mentioned and the balance" as therein mentioned.

The sums of 5887*l.* and 18,203*l.* were calculated as shown below :—

Super-tax 1927–28.

Total statutory income of firm for 1926–27, being the assessment to income tax Sch. D on the firm for the year ended April 5, 1927 . .			£33,152
Add taxed dividends received year ended April 5, 1927			756
			£33,908
Deduct :			
Salaries to partners :—			
E. R. Lewis . . .	£450		
M. L. Harrison . . .	400		
J. Brandon	1,000		
Others not named in draft deed	1,225		
		3,075	

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Brought forward :			
Income			£33,908
Deductions		3,075	
Interest on partners' capital :—			
L. F. Harrison	£400		
H. E. West	400		
		800	
Commission to partners :—			
J. Brandon	£1,109		
E. R. Lewis	5,437		
Others	1,017		
		7,563	
			11,438
			£22,470
Balance divisible among partners according to their respective shares (as follows) :			
L. F. Harrison		£10,836	
H. E. West		11,634	
			£22,470

Allocation of statutory income among partners.

	Salary	Interest on Capital	Commission	Share of Balance	Total
	£	£	£	£	£
L. F. Harrison	—	400	—	10,836	11,236
H. E. West	—	400	—	11,634	12,034
M. L. Harrison	400	—	—	—	400
J. Brandon	1,000	—	1,109	—	2,109
E. R. Lewis	450	—	5,437	—	5,887
Others not named in draft deed	1,225	—	1,017	—	2,242
	3,075	800	7,563	22,470	33,908

Super-tax, 1928–29.

Total statutory income of firm for 1927–28 as being the assessment to income tax, Sch. D, on the firm for the year ended April 5, 1928	£27,880
Add taxed dividends received year ended April 5, 1928	85
	£27,965

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Brought forward :			
Income			£27,965
Deduct :			
Salaries to partners :—			
M. L. Harrison	£600		
J. Brandon	1,375		
Others not named in draft deed	750	2,725	
Interest on partners' capital :—			
L. F. Harrison	£425		
H. E. West	425	850	
Commission to partners :—			
E. R. Lewis	£18,203		
J. Brandon	1,916		
Others	920	21,039	24,614
			£3,351
Balance divisible among partners according to their respective shares (as follows) :			
L. F. Harrison		£1,099	
H. E. West		2,011	
M. L. Harrison		241	£3,351

Allocation of statutory income among partners.

	Salary	Interest on Capital	Commission	Share of Balance	Total
	£	£	£	£	£
L. F. Harrison	—	425	—	1,099	1,524
H. E. West	—	425	—	2,011	2,436
M. L. Harrison	600	—	—	241	841
J. Brandon	1,375	—	1,916	—	3,291
E. R. Lewis	—	—	18,203	—	18,203
Others not named in draft deed	750	—	920	—	1,670
	2,725	850	21,039	3,351	27,965

This method of dividing among the partners the statutory income of the firm for any year involved :—

(*a*) first, the allocation to each partner of any salary, commission or interest on capital to which he was entitled for that year; and

(*b*) the division of the balance of the statutory income (that is what is left of the statutory income after such salaries, commission and interest on capital have been deducted) among the partners in the proportions to which the partnership deed entitles them.

Counsel for the appellant argued for another method. That method was :—

(*a*) to take the actual (not the statutory) income of the firm for the year as the starting point;

(*b*) to allocate to each partner any salary, commission or interest on capital to which he was entitled for that year;

(*c*) to divide the balance of the actual income among the partners in the proportions to which the partnership deed entitled them;

(*d*) to ascertain by the combination of (*b*) and (*c*) the percentage of the firm's actual income of the year to which each partner was entitled;

(*e*) to divide the statutory income of the firm for the year among the partners according to the percentages so obtained.

For the Crown it was contended that the method adopted in computing the assessments was the correct one, and that the assessments should be confirmed subject to a slight modification of the figures for 1928–29.

The appellant contended that the method adopted in computing the assessments led to inequitable results as between the partners, and that the method of computation is wrong in principle for these reasons :—

(i.) that the statutory income in the two material years was the assessment of the firm to income tax, Sch. D, for the years ended April 5, 1927, and April 5, 1928, plus a quite inconsiderable figure for taxed dividends, amounting in one year to 756*l*., and in the other to 85*l*.;

(ii.) that, admittedly, for the purpose of arriving at these assessments of the firm to income tax, Sch. D, commissions, etc., credited to the appellant and the other partners had been added back;

(iii.) that as the profits assessed to income tax included the amount of the commission, the assessment to super-tax, being based on the assessment to income tax, ought to be spread among the partners in the same proportion as they shared in the profits.

Counsel for the appellant accordingly argued that the correct method of division would be as follows:—

(*a*) To ascertain the percentage of the firm's actual profits to which each partner is entitled under the partnership deed, without regard to whether some part of those profits was or was not expressed in the deed to be payable to one or more of the partners as salary, commission, or interest on capital;

(*b*) to divide the whole of the statutory income among the partners according to the percentages so obtained.

The Commissioners gave their determination in the following terms:—

"We are of opinion that the method of computation contended for by the Crown is the correct one:

(*a*) It conforms at least as closely as the other method with the words of s. 20 of the Income Tax Act, 1918.

(*b*) It has on its side whatever authority on this point is to be obtained from *Gaunt's* case (1), where the method now contended for by the Crown was adopted and computations on that basis clearly set out in the case stated.

(*c*) The present state is not distinguishable in principle from the ordinary partnership case in which partners' salaries and interest on capital have to be taken into account in apportioning the assessment between the parties. The appellant's contention is contrary to the long standing practice in those cases which we do not feel justified in upsetting on what is at the best a doubtful interpretation of section 20; and the appellant's method of computation—which has for its first term the actual profits of the year of assessment—would make

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(1) [1913] 3 K. B. 395; 7 Tax Cas. 219.

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it impossible, in any case where a salary or interest on capital is credited to a partner, for statements of total income, whether for a claim to relief or for sur-tax purposes, to be made at the times contemplated by the Income Tax Acts."

The Commissioners therefore confirmed the assessments subject to an agreed variation in the 1928–9 assessment.

Sir Patrick Hastings K.C. and *H. C. Marks* for the appellant.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the respondents.

FINLAY J. In this case, but for the case of *Gaunt* v. *Inland Revenue Commissioners* (1), I should have desired to reserve judgment, because the point raised appears to me to be one of some difficulty, which I venture to hope, either in this case or in some other case, may fall to be considered by the Court of Appeal. The point has reference to the proper method of assessing a partner in a firm to super-tax. The method of assessment of firms is in general quite familiar, and is dealt with in s. 20 of the Income Tax Act, 1918, the material part of which for the present purpose is proviso (ii.). That is as follows: "The income of a partner from a partnership carrying on any trade, profession, or vocation shall be deemed to be the share to which he is entitled during the year to which the claim relates, in the partnership profits, such profits being estimated according to the several rules and directions of this Act." The income of the firm which has to be assessed is not, of course, the actual income of the firm for the year of assessment, but is what is called the statutory income. In this particular case that income was based upon the average of the three previous years, but that has been changed, and the income now is the income of the previous year. For the present purpose, however, the difference is immaterial. The point of somewhat serious difficulty in a case of this sort arises from the fact that the statutory income is different from the actual income of the year of assessment. One has to ascertain the shares of the partners by looking at the partnership deed and by ascertaining what was the actual state of things in the year of assessment, and then one has to divide up in accordance with those shares, not the income which was actually earned in that year, but an income arrived at as being the income of that year in accordance with the directions of the statute. In the present case the method by which the assessment has been arrived at is very clearly set out in the Case stated. The statutory income of the firm is taken. From that a deduction is made for "salaries to partners"; a further deduction is made for some "interest on partners' capital," and yet another deduction is made for "commission to partners." These three deductions are deducted from the statutory income, leaving a balance divisible among the partners, and, in accordance with the provisions of the partnership deed, that balance is divided among the only two partners who were entitled to it.

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(1) [1913] 3 K. B. 395; 7 Tax Cas. 219.

It seems to me that in an ordinary case the problem is comparatively simple. If, for example, you get a case of three partners each entitled to one-third of the partnership profits there is no particular difficulty in ascertaining the shares and then in applying them to the statutory income. But in a case such as the present, where there are complicated provisions contained in various clauses of the partnership deed for what I may call the remuneration of the partners, I think, and indeed it has been recognized by counsel on both sides, that a serious difficulty arises with regard to the method by which the assessment is to be made. It is obvious, as this case shows, that the method of division among the partners may vary according as the sum to be divided is large or is small, and that introduces an awkward complication. The method adopted by the Crown I have already indicated. The method for which the appellant contends is also very clearly set out towards the end of the Case as follows: "(*a*) To ascertain the percentage of the firm's actual profits to which each partner is entitled under the partnership deed, without regard to whether some part of those profits is or is not expressed in the deed to be payable to one or more of the partners as salary, commission, or interest on capital: (*b*) to divide the whole of the statutory income among the

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partners according to the percentages so obtained." What it is suggested should be done is very clearly expressed in those contentions, and it amounts to this: Ascertain the total income of the firm, the income actually earned in the year, which I think was 70,000*l.*, in round figures; next ascertain what all the different sources of remuneration, so to speak, salary, commission, and so on, of the particular partners amount to; and then work out the percentage sum based upon the proportion of the total profits which the particular partner is entitled to. To my mind there are features of difficulty or illogical elements involved in that method. One of these I indicated a moment ago, but it certainly, I think, has attractive points, and it would seem to be almost as close to the somewhat general words of the Act as the alternative method. In those circumstances, had it not been for *Gaunt's* case (1) I should have desired to consider the matter further, as I have already indicated. There (2) the method adopted by the Crown is shown in the Special Case, and I am satisfied, comparing that with the method which the Crown has adopted in this case, that the methods are the same. I was further told that for many years the method which was adopted in *Gaunt's* case (1) has been followed, and I suppose that thousands of assessments have been made in accordance with that method. I think that Sir Patrick Hastings was right when he said that in that case the attention of my brother Horridge was probably not specially called to the point with regard to the deduction of the actual amount of salaries drawn in the year, but, none the less, the method was clearly before my learned brother in that case, and in the course of his judgment he said: "It seems to me that the construction of the statute is fairly clear, and that the Commissioners for Special Purposes in this case have ascertained it on correct principles. They have taken the actual share to which the appellant was entitled during the year and have divided in this proportion the profits of the firm on the average of three years ascertained in accordance with the provisions of the Income Tax Acts."

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(1) [1913] 3 K. B. 395; 7 Tax Cas. 219.

(2) 7 Tax Cas. 219, 221.

When I am presented, as I am presented here, with two alternative methods; when I see, as I think I see here, that there are difficulties about each method and that each method may be so stated as to lead to illogical results, I think that it is important that I should look to see whether there is any authority, and if I find any that I should be guided by it. I have come to the conclusion that I should not be justified in these circumstances—and it is for this reason that I do not consider the matter more elaborately and fully—in departing from the method which I am told has been adopted for many years, when it is a method which, as I think, has received the sanction of a judge of this Court. In the present case the matter was dealt with by two very experienced Special Commissioners, and they said this: [His Lordship read at length the determination of the Commissioners as set out at the end of the Case, and continued as follows:] I have read that determination of the Special Commissioners and have read it in full, because the view there taken is, as will be understood, very much my own view. I think that I ought to decide in accordance with the contention of the Crown, and I base my decision upon *Gaunt's* case (1) and, to some extent, upon the long-standing practice which, no doubt following *Gaunt's* case (1), has been established in this matter. I repeat that if I felt myself free to deal with this case apart from the authority of *Gaunt's* case (1), I should have desired to consider it more fully; but in the light of that authority, I do not see my way to differ with the Special Commissioners. The result is that this appeal will be dismissed.

Appeal dismissed.

J. R.

The appellant appealed. The appeal was heard on July 6, 1933.

Sir Patrick Hastings K.C. and *H. C. Marks* for the appellant.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the respondents.

LORD HANWORTH M.R. This appeal fails. The case illustrates the confusion which is sometimes introduced by trying to apply the actual figures of a particular year's

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(1) [1913] 3 K. B. 395; 7 Tax Cas. 219.

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income for the purposes of the assessment to income tax in a case where what has to be ascertained under the Income Tax Act is a merely imaginary income computed by special rules, which may differ, and, it may be, widely differ, from the actual income enjoyed during the year of charge.

All we have to do in this case is to ascertain the proper assessment to super-tax upon the appellant in the two years 1927–28 and 1928–29. He was a partner in the firm of Hichens, Harrison, Woolston & Co. from January 1, 1927, until January 31, 1928, that is during parts of two financial years. For the first of the two years the assessment has to be made in respect of the amount to which he was entitled under the partnership from January 1 to April 5, 1927, and for the second year in respect of the amount to which he was entitled under the partnership during the period from April 6, 1927, to January 31, 1928. The terms of the partnership which existed between the partners are complex, and certainly I am not prepared to deal with what might have been the proper figures for the purposes of the assessment in some other circumstances, because I am by no means sure that, without the assistance of an accountant, I could properly compute what the result would be in other circumstances than those which the Case presents to the Court.

The question is: How are we to ascertain what is the super-tax to which this partner ought to be assessed in those two periods. We know that the assessment to income tax which is final and conclusive in a particular year is also to be final and conclusive in estimating the total income from all sources for the purpose of super-tax for the following year. We have also to bear in mind that, under s. 5 of the Income Tax Act, 1918, the total income of an individual for the purposes of super-tax is to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is required to be estimated under the Income Tax Act. We are dealing with a period when the income in question was for purposes of income tax computed on the average of three years.

I turn to read s. 20 of the Act of 1918. "The following persons having joint interests, that is to say, ... (*c*) partners carrying on a trade, profession or vocation together who are entitled to the profits thereof in shares, may claim" any allowance or deduction "according to their respective shares and interests, and any such claims which are proved to the satisfaction of the commissioners to whom they are made, may be dealt with in the same manner as in the case of several interests." Then follow two provisos, that which is applicable to the present case being proviso (ii.), as follows: "The income of a partner from a partnership carrying on any trade, profession, or vocation shall be deemed to be the share to which he is entitled during the year to which the claim relates, in the partnership profits, such profits being estimated according to the several rules and directions of this Act." The last words are of primary importance. It is quite true that the income of the partner is spoken of as being the share of the partnership profits that would be his under the partnership deed; but what are the partnership profits? They are to be profits "estimated according to the several rules and directions of this Act." We have, first of all, therefore, to get at an arbitrary sum of profits, estimated not according to the ordinary rules of business, but "estimated according to the several rules and directions of this Act." There are a number of points of great importance which cause a deviation from the actual profits in estimating the profits under the Income Tax Act; for instance, there is a prohibition against deduction in respect of interest on borrowed money, and there are other provisions which cause a divergence from the ordinary practice of business men in estimating profits.

First, then, we have to ascertain the profits "estimated according to the several rules and directions of this Act," and that involves in this case, as it did in *Gaunt's* case (1), an estimation of profits according to the three years' average. It cannot be said therefore that, because under the partnership deed the partner is entitled as his share in a particular

(1) [1913] 3 K. B. 395.

year to £*x*, he is to be taken, for the purpose of this proviso to s. 20, as entitled to take £*x* as the primary sum upon which other calculations are to be based; for what is to be taken into account is his share of the profits "estimated according to the several rules and directions of this Act." The words of the proviso are to the effect that the income of the partner "shall be deemed to be the share to which he is entitled during the year" in the partnership profits, "estimated according to the several rules and directions of this Act"; and that word "deemed" clearly indicates that the section is not dealing with the actual share he might receive, but with something which is deemed to be his share, or, in other words, something different from his true share of profits apart from the standard introduced by the Income Tax Act. When I turn to the figures in the Special Case, I find that, for the purpose of computing the appellant's share, account has been taken of the sum with which he was credited in each year in respect of his commission and, in the first year, in respect of his salary. That word "commission" includes not only the commission upon the investment business introduced, but also 45 per cent. of the profits "made and received by the firm in such year on any other business introduced by such partner."

It is said that the working out of the share of profits in accordance with the scheme adopted by the Crown is wrong for two reasons, and another wholly artificial method is suggested by counsel for the appellant. I will read from the Case: "Counsel for the appellant argued for another method. That method is: (*a*) to take the actual (not the statutory) income of the firm for the year as the starting point." That would be, to my mind, flying in the face of the last words of proviso No. (ii.). You cannot begin with the actual income of the firm as the starting point; you are forbidden to do that, because you have to estimate it "according to the several rules of the Income Tax Act." Next, it is suggested that you are: "(*b*) to allocate to each partner any salary, commission, or interest on capital to which he was entitled for that year; (*c*) to divide the balance

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of the actual income among the partners in the proportions to which the partnership deed entitles them." Then you are to add those two last figures together, and use them to ascertain to what percentage of the actual income—again not the statutory income—the partner was entitled. That may be one method, it may even be a good method, of finding out what the partner's share is; but it has no relation to and does not seek to follow the rules laid down in the Income Tax Act for computing the artificial income upon which the assessment is to be made. Finally, according to the appellant's plan, you are to divide the statutory income of the partnership for the year according to the percentages so obtained. That may be an ingenious method, but the answer to it is that it is not the method laid down in the Act.

It appears to me that *Gaunt's* case (1) was rightly decided. That case began by taking not the actual profits, but a starting figure arrived at by taking the average of the profits for the three years, 1906 to 1908. That involved breaking away entirely from actual profits. Starting with that statutory estimate of profits, the Crown made allowances and deductions which resulted ultimately in the figures which Horridge J. held to be correct. He said (2): "It seems to me that the construction of the statute is fairly clear, and that the Commissioners for Special Purposes in this case have ascertained it on correct principles. They have taken"—and this, I think, cannot be quite right—"the actual share to which the appellant was entitled during the year and have divided in this proportion the profits of the firm on the average of three years ascertained in accordance with the provisions of the Income Tax Acts." I think he meant that they had taken the profits of the firm on the average of the three years ascertained in accordance with the provisions of the Income Tax Acts, and from that they have made the actual deductions which were provided for in the terms of the deed between the parties. Correctly understood, I think Horridge J.'s judgment is in accord

(1) [1913] 3 K. B. 395.

(2) Ibid. 397.

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with what I have indicated to be my view of the true construction of this section.

For these reasons it appears to me that the appeal fails, and must be dismissed with costs.

Lawrence L.J. I agree. This is an appeal from a decision of Finlay J. affirming the decision of the Special Commissioners, who in turn affirmed the assessment appealed against.

The contention of Sir Patrick Hastings and Mr. Marks in support of the appeal is that, in order to ascertain the income of the appellant for super-tax purposes in respect of his receipts from the partnership, you must first ascertain the total income earned by the partnership in the year of charge, and then ascertain the share of the partner in those profits by adding up all the different items of remuneration to which the partner is entitled, under the articles, by way of profits, salary, commission and so on, and then work out the percentage sum based upon the proportion which his share of profits bears to the total amount actually earned by the partnership in the year of charge and apply that percentage to the statutory income of the partnership. This method of computation may no doubt be an attractive way of ascertaining the income of the appellant for the purpose of super-tax. It has its difficulties, but none that I can see that could not be got over. However attractive this method may be, its adoption does not seem to me to be warranted by the provisions of the Act under which the partner is to be assessed for super-tax. There is nothing in the relevant enactments which contemplates that, for the purpose of assessment of super-tax, the actual income of the partnership in the year of charge should be ascertained at all. The income of the partner for the purpose of income tax (which is conclusive for super-tax purposes) is to be calculated on the previous year's income of the partnership, and by s. 20 that income is made the basis of the assessment of the partner for super-tax purposes. Proviso (ii.) of s. 20 might well have been more plainly expressed, but I think it is to be interpreted as meaning that the income of a partner from the partnership is to be deemed to be the share to which he would have been entitled during the year of assessment in the partnership profits had those profits been the statutory profits; in other words, the statutory profits are to be taken as the basis of the calculation, and to be treated as if they were the profits during the year of charge, and the actual profits made by the partnership during that year do not come into the calculation at all.

Applying this method to the present case, after the statutory profits have been ascertained, all that remains to be done is to find out to how much of those profits (treating them as the actual profits of the year) would the partner be entitled by way of interest on capital, commission, salary and share of profits. That has been done in the present case, as it was done in *Gaunt's* case. (1) It is, of course, true, as Sir Patrick Hastings pointed out, that during the year of charge the proportion of profits to which the partner may be entitled may differ from the proportion to which he might have been entitled in the profits during the previous year which were the statutory profits. It is plain, however, that, if during the year of charge there had been an alteration in the share of the profits of the partner, or if there had been an increase or diminution in his salary during that year, the partner would for super-tax purposes be charged with the actual amount whether increased or diminished which, during the year of charge, would represent his proportion of the statutory profits of the firm for that year. However plausible it may appear to ascertain the share of the partner for super-tax purposes by the method suggested by the appellant, I cannot find any warrant for the adoption of that method in s. 20 of the Act, and I therefore agree that this appeal fails.

SLESSER L.J. This case has given me very considerable difficulty, but, on consideration, I am not prepared to differ from the view which has been expressed by my Lords. I obey the injunction of the Attorney-General and rivet my

(1) [1913] 3 K. B. 395.

attention on the actual language of proviso (ii.) to s. 20, but, unfortunately, when I look at that proviso, the language which the Legislature has there employed is so difficult to fit to the problem which arises in this case that at least two possible interpretations emerge from it.

The difficulty arises in this way. There is no doubt at all that the partnership profits which have to be considered are what have been called the statutory profits—that is, to use the language of the Act, those "estimated according to the rules and directions of this Act." At the time of the case which we have here to consider, the statutory provision of taking a three years' average was still in force, and there is no question that the partnership profits are primarily to be ascertained by reference to the statutory average as found here by the Commissioners. That, as I understand it, was the decision in *Gaunt's* case (1); it was there decided that you could not look to the actual year of profits for the purpose of obtaining the partner's share for super-tax purposes, but were to look to the three years' average as stated in the statute. It was on that matter, primarily, I think, that the Crown succeeded in *Gaunt's* case. (1) The difficulty which arises here is that the income of the partner is to be deemed the share to which he is entitled during the year to which the claim relates, that is the year of charge. In order to find out to what he is entitled, one would primarily have to look, as the Attorney-General agreed, to the partnership deed itself, and, of course, the partnership deed dealing with the profits of one particular year is, by its language, inappropriate to give a share of profit to the partner in one year to be compared with the statutory profit ascertained over three years. I think, on consideration, that the language is not strong enough in favour of the subject to enable the device which has been suggested by Sir Patrick Hastings and Mr. Marks to be employed. I think that we are directed to look at the partnership profits as estimated on the three years' average, and I think that the share to which the partner is entitled must therefore be deemed to be, to use the language of the section, the share spread over that notional three years' profit. It is not what the section in terms says, and that is what has caused me difficulty; but I think, as has been pointed out by my Lord, that the words "shall be deemed to be" are put in expressly for the purpose of producing a position which otherwise could not have been achieved, and to deal with the very problem that the partnership deed as such would not take cognizance of this average three years' profit, and so to bring the matters of the share and the profit properly into relation with one another, making them comparable instead of disparate matters.

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(1) [1913] 3 K. B. 395.

Therefore, though with some doubt and difficulty, I do not find myself prepared to differ from the conclusion arrived at by the majority of the Court.

Solicitors: *Theodore Goddard & Co.; Solicitor of Inland Revenue.*

H. C. G.

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July 7, 10, 11.

ASSAM RAILWAYS & TRADING COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—English Company—Business carried on in India—Debentures—Interest thereon—Deduction allowed by Indian Law in estimating Profits—Assessment in England—Deduction of Debenture Interest not allowed—Claim to have paid Indian Tax on whole Income—Claim to Relief—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Case I., Sch. D—Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 27.

By s. 27, sub-s. 1, of the Finance Act, 1920: "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined" as therein set out.

A company was incorporated in England under the Companies Acts and had issued debenture stock. The company was controlled by its Board in England and was accordingly taxed under Case I. of Sch. D of the Income Tax Act, 1918, on the whole of its profits which arose from its business in India. In computing its profits under Case I. no deduction was allowed in respect of interest on the debenture stock. The whole of the profits of the company were made in India, on which it had paid Indian income tax. In computing the profits for the purpose of Indian income tax law a deduction had been made in accordance with that law from the profits of the amount of interest paid in respect of the debenture stock.

On a claim by the company for relief under s. 27 of the Finance Act, 1920:—

Held, that as no tax had in fact been paid by the company in India on the debenture interest no relief could be claimed in respect of it under s. 27 of the Act.

Rolls Royce, Ld. v. *Short* (1925) 10 Tax Cas. 59 discussed.

Inland Revenue Commissioners v. *Dalgety & Co.* [1930] A. C. 527 distinguished.

Decision of Finlay J. affirmed.

APPEAL from a decision of Finlay J. on a Case stated under the Finance Act, 1921, s. 28, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on January 8, 1932,

the Assam Railways & Trading Company, Ld. (hereinafter called "the Company"), claimed relief in respect of Indian income tax under the provisions of s. 27 of the Finance Act, 1920, for the two years ended April 5, 1929, and April 5, 1930.

2. The Company was a company incorporated in England under the Companies Act with an authorized share capital of 1,160,000*l.*, the whole of which had been issued.

The Company had also issued in the United Kingdom 500,000*l.* 4½ per cent. mortgage debenture stock and 400,000*l.* 5 per cent. debenture stock. The interest paid on these debenture stocks for each of the years under appeal amounted to 42,500*l.*

3. The business of the Company was that of running a railway and working coal mines, timber concessions, sawmills, veneer mills and brickworks in Assam, and it also carried on a plantation business there. The whole of the Company's business arose in India with the exception of the dividends on certain English investments which were taxed at the source and certain interest on moneys lying in England with regard to which no question arose.

4. The Company was controlled by its Board in England, and was accordingly taxed under Case I. of Sch. D of the Income Tax Act, 1918, on the whole of the profits arising from its business in India. In computing the profits for assessment under Case I. no deduction was allowed in respect of the debenture stock interest, amounting to 42,500*l.*, and this interest was consequently included in the assessment to United Kingdom income tax. The debenture stock, which was secured by English trust deeds, was issued in the United Kingdom, and the interest was paid by the Company in the United Kingdom.

5. Indian income tax and super-tax were charged for the two years in question on the profits of the Company arising in India under the provisions of current Indian Finance Acts and of the Indian Income Tax Act, 1922. The Indian income tax year ended on March 31.

6. The Company made up its accounts annually to March 31, so that the profits forming the basis of assessment

for United Kingdom income tax and Indian income tax for the two years to which the appeal related were the same —namely, the profits of the years ended March 31, 1928, and March 31, 1929, respectively.

7. The following are the material provisions of the Indian Income Tax Act, 1922:—

> 3. Where any Act of the Indian Legislature enacts that income-tax shall be charged in any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals.
>
> 4. (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.
>
> 6. Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely:—
>
> (i) Salaries.
> (ii) Interest on securities.
> (iii) Property.
> (iv) Business.
> (v) Professional earnings.
> (vi) Other sources.
>
> 8. The tax shall be payable by an assessee under the head "Interest on securities" in respect of the interest receivable by him on any security of the Government of India or of a Local Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company.
>
> 10. (1) The tax shall be payable by an assessee under the head of "Business" in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :—

(iii) In respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid.

18. (1) Income-tax shall, unless otherwise prescribed in the case of any security of the Government of India, be leviable in advance by deduction at the time of payment in respect of income chargeable under the following heads :—

(i) "Salaries"; and

(ii) "Interest on securities."

(3) The person responsible for paying any income chargeable under the head "Interest on securities" shall, at the time of payment, deduct income-tax on the amount of the interest payable at the maximum rate.

(4) All sums deducted in accordance with the provisions of this section shall, for the purpose of computing the income of an assessee, be deemed to be income received.

(5) Any deduction made in accordance with the provisions of this section shall be treated as a payment of income-tax on behalf of the person from whose income the deduction was made, or of the owner of the security, as the case may be, and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act :

Provided that, if such person or such owner obtains, in accordance with the provisions of this Act, a refund of any portion of the tax so deducted, no credit shall be given for the amount of such refund.

(8) The power to levy by deduction under this section shall be without prejudice to any other mode of recovery.

19. In the case of income chargeable under any other head than those mentioned in sub-section (1) of section 18, and in any case where income-tax has not been deducted in accordance with the provisions of that section, the tax shall be payable by the assessee direct.

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55. In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature.

Provided that, where the profits and gains of an unregistered firm have been assessed to super-tax, super-tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share.

Rule 24. Income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income derived from business and 40 per cent. of such income shall be deemed to be income, profits and gains liable to tax.

8. Under the provisions of s. 10, sub-s. 2 (iii.), of the Indian Income Tax Act, 1922, a deduction was allowed in computing the profits for the purpose of assessment to Indian income tax for the interest paid on the debenture stocks of the Company, the money raised by the issue of the debenture stocks being capital borrowed for the purpose of the business, and the interest thereon not being in any way dependent on the earning of the profits. The Company did not deduct Indian income tax on payment of the interest under s. 18 of the Indian Income Tax Act, 1922.

The figures shown as 10,708*l.* and 2365*l.* against the items Bogapani Tea Garden account and Bogapani Tea Garden expenditure respectively in Exhibit "B" thereinafter referred to for the year 1928–29, and the figures 311*l.* and 2460*l.* against the same items for the year 1929–30 were not included in the net revenue account of the Company and were not brought into the computations for the assessments for Indian income tax. These sums were respectively included in the computations for the assessments to United

Kingdom tax for these years being arrived at in the manner shown in note (B) to the said Exhibit.

The computations of profits for assessment to United Kingdom and Indian income tax differed in several material respects. Thus for the year 1928–29 the assessment to United Kingdom income tax under Case I. of Sch. D was in the sum of 194,168*l.*, less 4995*l.* wear and tear, the 42,550*l.* debenture interest not being allowed as a deduction in computing the profits, and the item "Bogapani Tea Garden Account" being included. For the same year the assessment to Indian income tax was in the sum of 129,365*l.*, the debenture interest being allowed as a deduction and the item "Bogapani Tea Garden Account" not being included. There were also several other differences between the two computations.

9. The Inspector of Taxes claimed that in the allowance of relief to the Company under s. 27 of the Finance Act, 1920, both the debenture interest and the item "Bogapani Tea Garden Account" should be deducted in arriving at the amount on which relief should be allowed. Thus for the year 1928–29 the Inspector computed the relief allowable as follows (the figures being given as subsequently adjusted) :—

Assessment to United Kingdom :		
Income Tax under Case I. of Sch. D		£191,803
Less Wear and Tear		4,995
		£186,808
Less English income	£58	
Debenture interest	42,500	
Bogapani Tea Garden Account .	8,343	50,901
		£135,907

Relief on 135,907*l.* at 2*s.* in the £ = 13,590*l.* 14*s.*

The Company claimed that the relief should be allowed on the sum of 186,808*l.*, less 58*l.* English income only, and that no deduction should be made for the debenture interest or the item "Bogapani Tea Garden Account."

10. It was contended on behalf of the Company :—

(1.) That the relief should be based on the amount of the income as computed for the purpose of the United Kingdom tax, and that the method by which the Indian assessment was computed and the deductions allowed in arriving at that assessment were immaterial.

(2.) That accordingly the fact that the debenture stock interest had been allowed as a deduction and that the Bogapani Tea Garden item had not been included in computing the Indian assessment should not be taken into account, and the relief should be allowed on the amount of the United Kingdom assessment without any deduction for these two items.

11. It was contended on behalf of the Commissioners of Inland Revenue (inter alia) (1.) that the debenture interest and the Bogapani Tea Garden profits had been excluded from the subjects of taxation on the Company in India; (2.) that on those parts of the Company's income it had not paid Dominion income tax, and, consequently, no relief was due from United Kingdom income tax on such parts.

12. The cases of *Rolls Royce, Ld.* v. *Short* (1) and *Inland Revenue Commissioners* v. *Dalgety & Co.* (2) were referred to.

13. The Special Commissioners, having considered the arguments, gave their decision as follows :—

"The main question in this case is on what part of the income of the appellant Company has Indian income tax been paid ?

"The appellant Company contends that it has paid Indian income tax on the whole of its profits arising from its business in India, while the Crown contends that it has only paid Indian income tax on its profits from its business in India less the profits applied in payment of its debenture interest for which allowance has been made in computing its business profits under s. 10, sub-s. 2, of the Indian Income Tax Act, 1922.

"It was argued on behalf of the appellant Company that the whole of the Indian income was income from one source, and that in determining the part of the income on which relief is allowable regard must be had to the source from which it is derived and not to its amount. In support of this argument reliance was placed on a dictum of Warrington L.J. in the case of *Rolls Royce, Ld.* v. *Short.* (1) It must, however, be observed that in that case the Court was only concerned with English income as a whole and Indian income as a whole, and no question arose as to whether Indian income tax had been paid on different parts of the Indian income.

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(1) 10 Tax Cas. 59.

(2) (1929) 15 Tax Cas. 216; [1930] A. C. 527; [1930] 1 K. B. 1.

"It seems clear to us that where under Dominion income tax law different parts of the Dominion income are separately treated as regards the liability to Dominion income tax, we are bound to discriminate between those different parts and see whether Dominion income tax has been paid in respect of each of those parts or not.

"In this case the income applied in payment of the debenture interest has been specifically excluded from the profits on which the appellant Company has been assessed to Indian income tax, and consequently no Indian income tax has been in fact paid in respect of the part of the profits so applied.

"Moreover, under s. 18 of the Indian Income Tax Act, 1922, debenture interest is made the subject of a separate charge to Indian income tax, though in the case of the appellant Company no tax has been paid under the provisions of that section.

"In view of the specific separation of the income applied in payment of the debenture interest from the rest of the income, we are of opinion that the income so applied must be regarded as a separate part of the appellant Company's income, and as no Indian income tax has been paid on this part of its income, no relief can be allowed thereon and the appeal fails on the main question.

"On the subsidiary question of the profits of the Bogapani Tea Garden, it appears on the evidence before us that these profits have not been made liable to Indian income tax and that no Indian income tax has been paid in respect thereof.

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(1) 10 Tax Cas. 59.

We hold, therefore, that no relief can be granted in respect of these profits.

"On the figures being agreed, we will give our final decision."

Relief was subsequently granted in accordance with this decision.

14. The Company upon the determination of the appeal declared its dissatisfaction therewith as being erroneous in point of law, and in due course required the Special Commissioners to state a Case for the opinion of the High Court pursuant to the Finance Act, 1921, s. 28, and the Income Tax Act, 1918, s. 149, which Case the Special Commissioners stated and signed accordingly.

15. The question for the opinion of the Court was whether in computing the amount on which relief was due to the Company under s. 27 of the Finance Act, 1920, in respect of Indian income tax the interest on the debenture stock and the Bogapani Tea Garden item as adjusted were to be deducted.

Finlay J. affirmed the decision of Special Commissioners and dismissed the appeal.

The Company appealed. The appeal was heard on July 7, 10 and 11, 1933.

Latter K.C. and *Cyril King* for the appellants. The question here turns on s. 27 of the Finance Act, 1920, and in order to obtain relief from United Kingdom income tax under that section the essential matter is to show that the appellants have paid Dominion income tax on the same part of their income in the same year. When once that has been established, regard must be had purely to the United Kingdom figures for the purpose of ascertaining the proper relief. It is impossible to have regard to the figures in both places, for the payments of income tax are or may be made on different calculations of the income. Thus in *Rolls Royce, Ld.* v. *Short* (1) the income was assessed to United Kingdom income tax on the basis of the average of the profits in the three preceding years, while in India it was assessed to tax on the basis of the actual profits in the

(1) 10 Tax Cas. 59.

year of assessment. Here the Crown is seeking to pick out two items of income and to say that the appellants are not entitled to relief on them. The first of them is the profits on a tea garden, but that tea garden is not carried on as a separate business but as part of the entire business of the appellants the profits on which have paid Indian income tax. The second claim of the Crown is as regards the debentures issued by the appellants. The only ground on which it could be claimed to pick out separate items of income is that they are derived from separate sources, but, as already pointed out, the tea garden is not a separate source and the debentures are not a source at all but a liability. They do not provide the appellants with income, and it is immaterial that owing to different modes of assessment in the two countries the interest paid on debentures is a proper deduction from income for the purpose of assessment in the one country and not in the other. The expression "any part of his income" in s. 27 of the Act of 1920 simply means the part which has borne double tax, in this case the portion consisting of profits made in India: *Rolls Royce, Ld.* v. *Short.* (1) When once it is established that a part of the income of the appellants has borne tax in India, they are entitled to relief in respect of that part in England. By "part of his income" is meant income derived from a particular source: per Warrington L.J. in *Rolls Royce, Ld.* v. *Short.* (2) Finlay J. was wrong in treating the tea garden and the debentures as separate sources. The section does not say that relief is to be given only in respect of the amount in figures which has been subjected to double tax but that it is to be given in respect of the part of the income which has borne double tax: compare *Inland Revenue Commissioners* v. *Dalgety & Co.* (3) There cannot be "discrimination in the matter of relief between companies which have and companies which have not made a debenture issue": see per Lord Macmillan in *Inland Revenue Commissioners* v. *Dalgety & Co.* (4) The way Dominion income tax

(1) 10 Tax Cas. 59.
(2) Ibid. 71, 72.
(3) [1930] 1 K. B. 1, 33.
(4) [1930] A. C. 527, 543.

has been dealt with in the past supports the view that regard can only be had to separate sources. Indian tax was simply treated as a trade expression until a measure of relief was given in addition by the Finance Act, 1916. The same provision appeared in the Income Tax Act, 1918, s. 55, and the deduction as an expense and the relief went side by side till the Finance Act, 1920, s. 27, was passed, which gives relief, but by sub-s. 4 does away with the right of deduction. Before 1920 it could not have been said that any income tax paid in India was not a proper deduction, and there could have been no right to divide up various activities in India. The position must be the same now.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown. In determining the extent to which relief is to be granted under s. 27 of the Act of 1920 regard must be had to the part of the income assessed to tax in the United Kingdom which "can be identified and proved to have paid Dominion tax": per Lord Hanworth M.R. in *Rolls Royce, Ld.* v. *Short.* (1) The question then is what is meant by "any part of . . . . income." Reference had been made to *Inland Revenue Commissioners* v. *Dalgety & Co.* (2), but the decision there turned entirely on the meaning of the word "paid" in s. 27, and the case throws no light on the meaning of "part of his income." The argument for the appellants in this case is in effect that income which comes out of India must be treated as having been subjected to tax in India and that "part of income" has a geographical meaning. That is not the right construction of s. 27, which is intended to give relief only to the extent that double tax has been actually paid. *Rolls Royce, Ld.* v. *Short* (3) shows that the principle is that it is only within the area in which both English and Indian tax has been paid that relief can be claimed.

[They were stopped.]

Latter K.C. replied.

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(1) 10 Tax Cas. 59, 70.
(2) [1930] A. C. 527.
(3) 10 Tax Cas. 59.

LORD HANWORTH M.R. This is an appeal from a decision of Finlay J. which was given on February 14, 1933. The case raises an important point to the appellants, the Assam Railways & Trading Company, Ld. They are seeking to have relief under s. 27 of the Finance Act, 1920, in respect of certain income tax charged in the United Kingdom by reason of the fact that they have paid what is called "Dominion income tax."

The facts upon which the point arises may be stated quite shortly. The business of the company is a composite one. It runs a railway, and, as the part of its name "Trading Company" indicates, it has other activities: for instance, it works coal mines, timber concessions, saw-mills and brickworks, and carries on a plantation business in Siam. The company is an English company; it is controlled by a Board in England. It is taxed under Case I. of Sch. D on the whole of the profits which arise from its business in India, and it is from India, and from India alone, that its profits are derived.

The Company has issued certain debentures, and the interest upon those debentures amounts to the sum of 42,500*l*. That figure has been referred to with some insistence, because it is the largest of the sums which make up the divergence in the two views of the appellants and the respondents as stated in this Court. The Company claim that they are entitled to have a deduction made in respect of the income tax which they have been charged in India. They say that the whole of their profits arising from the whole of their business have come under the review of the income tax authorities in India and the result is that they have, according to the system prevailing in India, paid income tax upon the whole of their profits before those profits came over here and were received by the Board in London, and they claim that they are entitled, in consequence, to have the relief which they are given by s. 27 measured by the fact that the whole of their profits have already suffered a diminution by paying income tax to the Indian central authority.

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ASSAM RAILWAYS & TRADING Co. v. INLAND REVENUE COMMISSIONERS.

Lord Hanworth M.R.

One of the most notable differences between the systems of calculating the assessable income in India and in England is this: whereas under r. 3 of the Rules applicable to Cases I. and II. of Sch. D it is provided that in the United Kingdom in computing the amounts of the profits or gains which are to be charged, no sum shall be deducted in respect of any annual interest payable out of the profits or gains and there is, therefore, no right to deduct the sum which has to be paid by way of interest upon the debenture debt, it is otherwise in India, and apparently they are allowed to deduct, before computing their true profits, a sum which has to be charged against those profits for the purpose of paying the debenture interest. It will be noted, therefore, that in figures which are considerable but are not so large that a sum of 42,500*l.* is a negligible item, there must arise a considerable difference between the profits which are subjected to Indian income tax and the profits which, according to English computation, would be subjected to the United Kingdom income tax. In the first case the Company would be entitled to deduct 42,500*l.* from their profits in India and therefore pay a smaller sum as the total due from them for income tax, whereas if the same profits were to be scrutinized according to the English system they would not be allowed to deduct this 42,500*l.* I have given that figure in order to mark a distinction which stands out in the two systems adopted by India and by the United Kingdom; but I think that dwelling upon a particular item, large and important though it is, is likely to lead one into an error when we have to consider the problem that is before us.

The question is, to what relief from the United Kingdom income tax are the Assam Railways & Trading Company, Ld., entitled? They contend (para. 10 of the Case): (1.) "That the relief should be based on the amount of the income as computed for the purpose of the United Kingdom income tax, and that the method by which the Indian assessment was computed and the deductions allowed in arriving at that assessment were immaterial.

(2.) That accordingly the fact that the debenture stock interest had been allowed as a deduction and that the Bogapani Tea Garden item had not been included in computing the Indian assessment should not be taken into account, and the relief should be allowed on the amount of the United Kingdom assessment without any deduction for these two items." Shortly put, I may repeat that the claim of the Company is to say: "The whole of our profits have been reviewed for the purpose of paying income tax in India: it is the whole of those same profits which are under review in the United Kingdom for the United Kingdom tax; and we are entitled to relief in respect of the whole of those profits, for they are the same in both countries."

Now we have to look at s. 27 of the Finance Act, 1920, very carefully. Two cases have been called to our attention, the one the *Rolls Royce* case (1), the other the *Dalgety* case. (2) I think it may be at once stated that the latter case has no relevance to the point we have to consider. In the *Rolls Royce* case (1) it is said by Mr. Latter, in a forcible argument, that there are words to be found in Warrington L.J.'s judgment, and also in that of Atkin L.J., which, if they do not confirm, at any rate lead on to, the view which he has advanced in this Court. For my part, I adhere to the judgment I expressed in that case, and in particular to the conditions on which relief is given and which I there table (3), but I also think it wise to repeat what I there said (4): "It is never possible to forecast the result of such a relieving section generally. Experience may prove that in effect it does not give relief in as many cases as it was hoped and anticipated, and indeed intended that it should do." This case, to my mind, must be considered in the light of its own facts and in the interpretation to be put upon the section itself. Now s. 27 was intended to give a relief from the United Kingdom tax in respect and because of the payment already made of a similar tax in a Dominion, and, as I point out in the *Rolls Royce* case (1), a person who is entitled to relief is a person who has paid United Kingdom tax by deduction or otherwise for any year of assessment on any part of his income. The relief is a relief from United Kingdom tax, and it is upon that part of the income which has paid Dominion income tax.

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(1) 10 Tax Cas. 59.

(2) 15 Tax Cas. 216.

(3) 10 Tax Cas. 59, 69.

(4) Ibid. 70.

Now what does one mean by "United Kingdom income tax" and "Dominion income tax"? Before I examine sub-s. 1, I wish to go to the table of interpretations which are to be found in sub-s. 8 and which are contained in (*b*), (*c*) and (*d*). We are there told (*b*) that for the purpose of the construction of this sub-s. 1 we are to interpret the term "United Kingdom income tax" in a particular way, and it means the income tax chargeable in accordance with the provisions of the Income Tax Acts. Then "(*c*) The expression 'Dominion income tax' means any income tax or super-tax charged under any law in force in any Dominion, if that tax appears to the Special Commissioners to correspond with United Kingdom income tax or super-tax." The duty of deciding whether such a tax corresponds with income tax or super-tax of the United Kingdom charged upon the Special Commissioners is no doubt for this purpose that in some Dominions there may be an analogous tax, imposed under a different name or with a somewhat different system, but yet a tax which the subject may be able to convince the Special Commissioners has the same characteristics that belong to our own income tax over here. "(*d*) The expression 'Dominion rate of tax' means the rate determined by dividing the amount of the Dominion income tax paid for the year by the amount of the income in respect of which the Dominion income tax is charged for that year." Then there is an exception, that where it is charged on an amount other than the ascertained amount of the actual profits the Dominion rate of tax shall be determined by the Special Commissioners, power being given to the Commissioners to adjust what needs adjustment if it is not charged in respect of actual profits. Then come some further words, that "For the purposes of this section, the rate of United Kingdom income tax shall be ascertained by dividing by the amount of the taxable income of the person concerned the amount of tax payable by that person on that income before deduction of any relief granted" and so on. Now to my mind the directions and interpretation given in (*b*), (*c*) and (*d*) all point to the separate systems of ascertainment of income tax being treated as separate and independent—different firmaments, if I may use that expression—and you are to ascertain the Dominion rate of tax by taking the sum which is actually charged for the year and making your calculation by a dividend and a divisor; and in the same way you are to ascertain the rate of the United Kingdom income tax, again, by taking the actual amount of the taxable income. We have therefore in those passages a definite reference to what is the statutory or taxable income quite apart from, and independent of, the real income.

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(1) 10 Tax Cas. 59.

Now be it remembered that the amount of relief which is to be given under sub-s. 1 is not from the whole of the tax paid in a Dominion; it is to be determined as follows: "(*a*) If the Dominion rate of tax does not exceed one-half of the appropriate rate of United Kingdom tax, the rate at which relief is to be given shall be the Dominion rate of tax: (*b*) In any other case the rate at which relief is to be given shall be one-half of the appropriate rate of United Kingdom tax." To my mind it is quite plain that you have to take the two separate systems of ascertaining taxable incomes in each country, and, when you have got those two rates, then you are able to set one rate against the other, and you may get the whole of the Dominion rate allowed if that is less than one-half of the appropriate rate in the United Kingdom, but you cannot get more than one-half. Those factors are, to my mind, very important in considering what is to be the right interpretation of sub-s. 1.

In the present case we have not the complexity which arose in the *Rolls Royce* case (1) of a different system of

(1) 10 Tax Cas. 59.

computing the tax, nor have we the difficulty that may arise from the different terminations of the year of charge. We have the simple case of two similar periods and the same profits but charged under the statutory directions in each country in a different way and resulting, therefore, in a different tax. It is said by Mr. Latter: "If you will apply the system of what may be called the *Salisbury House Case* (1) to the profits which have been dealt with in India, the whole of the income has been scrutinized for the purpose of being charged to Dominion income tax; all of it has been passed in review; and it matters not whether some items have been allowed by way of deduction or not. The whole of it has been reviewed and therefore it is comparable with the whole of the income which has once more to be reviewed for United Kingdom income tax." I repeat that by way of emphasis because I now proceed to look at sub-s. 1. It says: "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income"—now it must be remembered that these words include, and identify, a person of this sort: a person who may have a composite income derived in part from securities which would fall to be taxed under Sch. C, some part of whose income would fall to be taxed under Sch. A, and some portion of whose income is derived by profits sent over from a Dominion. The part of the income that is cognizable under this section is the part which comes from the source overseas and which is to that extent separate and distinguished from the part which falls, say, under Sch. C. Now having got that, if that person "proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income"—again that would be the part as contradistinguished from the part of his income that falls under Sch. C—"he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income"—that is, the part that comes from overseas—"at a rate thereon to be determined as follows."

(1) [1930] A. C. 432.

The situation which is claimed by Mr. Latter, on behalf of the Company, is very arguable; it is attractive, and indeed I make no secret that during the considerable part of this case I was inclined to hold the view which Mr. Latter presented. I am glad to reveal that because it shows—at least I hope it shows—that I have given full consideration to the view he presented. But when we come to consider what is to be the relief, it has to be shown by the taxpayer that on a part of the income which is his statutory income in the United Kingdom he has paid Dominion income tax for that year. Now are we to reopen and to readjust the figures in each country? Are we to set side by side the items which compose the total assessable income for which the man is to be charged first in the Dominion and afterwards in the United Kingdom? To my mind, not so. You have to deal with the results which have been attained by following the legislative directions in each country, and you have to deal with the total result when the exemptions or deductions or abatements have been allowed, and you cannot scrutinize those abatements or deductions by a comparison with a different system in the other part of the Commonwealth; and it falls upon the taxpayer to prove that he has paid income tax for that year in respect of the same part of his income. Now he has paid in the present case tax in India on a part of his income which is revealed by the assessment which I find at p. 5 in the Exhibit "C": there is found the order as to what this Company is to pay: "Order. The Income-Tax adjustment account of the Company is as follows": profit is taken, and the allowance for debenture interest, and so on. The result is that the total figure is 129,365*l.*; then by converting that into rupees at 1*s.* 6*d.* you get a figure of 1,724,866 rupees, and an income tax at 18 pies upon that brings you to a total assessment of 161,706 rupees 3 annas. That is the total of the statutory income which is made chargeable to income tax, and that is the amount that is paid. Taking that as the starting point the Company can then show that it has paid income tax at the rate which will be discovered by following out the directions which I have already referred to in (*c*); you will then find that it has paid tax on this sum of 129,365*l.* at that rate, and, as we know those are the profits of the Company, the Company can show that to that extent, the extent of 129,365*l.*, it has paid Dominion tax for that year in respect of that part of its income, and that is the same part as falls to be included in the total statutory income subjected to United Kingdom income tax. It is in respect of that sum, and, so far as I can understand, that sum only, that the relief is given by the section. As a matter of fact, we read from the Case that for some reason, which I dare say is good but does not for the moment appear very easy to understand, the Commissioners have allowed that Dominion income tax has been paid on a sum of 135,907*l.*, part of the total sum which is assessed to United Kingdom income tax—namely, 186,808*l.* If any adjustment has to be made the case will have to go back to the Commissioners for it to be made, but, as I suppose the Crown are content with the figures as represented in the Case, the figure of relief would then stand as on 135,907*l.*, which appears to be larger than the figure on which there was an actual payment of the tax upon the statutory figure found to be liable to Dominion income tax.

It is for these reasons that I have come to the conclusion that the respondents are right, and that the appeal must be dismissed with costs. I will only add this, that, while I adhere to the conditions that I table in the *Rolls Royce* case (1), I do not find assistance from that case, because I think that all the judges were making the observations that they did in that case alio intuitu, and we have a different problem to solve here, based upon the proper construction of s. 27.

LAWRENCE L.J. I agree. Sect. 27 is aimed at relieving a taxpayer against double taxation where he has already paid Dominion income tax in respect of the income which is sought to be taxed in the United Kingdom.

(1) 10 Tax Cas. 59, 70.

In the present case there is no complication of facts or figures. The income tax is assessed on the gains and profits earned in the same period in India and in England: the amount of the profits and gains to be brought into charge for income tax is the same in both countries. In India allowances are made in respect of the profits and gains which result in the taxable income of the appellants being 129,365*l.* In the United Kingdom allowances are made in respect of the same profits and gains which result in the taxable income of the appellants being 186,808*l.* Now what has to be ascertained in order to measure the relief to which the taxpayer is entitled under s. 27 is: On what part of the taxable income in the United Kingdom have the appellants paid income tax in India? To my mind, the answer in the circumstances of this case is plain: that they have only paid Indian income tax upon 129,365*l.*, part of the taxable income in the United Kingdom of 186,808*l.*, and that there is no duplication of taxation so far as regards the difference between those two sums, with the result that the appellants are only entitled to relief in respect of 129,365*l.*, part of their taxable income of 186,808*l.* That, it seems to me, is carrying out both the letter and the spirit of s. 27.

I agree that this appeal fails.

SLESSER L.J. I agree. I find, in *Rolls Royce, Ld.* v. *Short* (1), although the matter there to be considered was different from that in the present case, the following statement of principle in the judgment of the Master of the Rolls which I apply to the present case: "The fact of paying a tax in a Dominion does not induce relief. The basic condition is that a person has paid tax on his income over here —then, if some part of that income so charged and assessed to tax in the United Kingdom can be identified and proved to have paid Dominion tax, that same part which has suffered dual taxation can be relieved of the tax paid here, up to the measure of relief given by the section." So applying that basic condition to the present case, I ask myself what amount here can be identified and proved to have paid

(1) 10 Tax Cas. 59, 70.

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Dominion tax so that, related to the income tax charged in the United Kingdom, it can be said that that amount has suffered dual taxation; and the amount, as appears from para. 8 of the Case, is 129,365*l*. That sum, and that sum only, in my opinion, can be identified and proved to have paid Dominion tax out of the total of 186,808*l*. assessed to United Kingdom income tax. I do feel the difficulty which has been pressed upon us by Mr. Latter to be such that we are compelled to say, as his argument would lead us to say, that directly it is shown that a part of the income which is assessable to United Kingdom income tax has paid tax in India, necessarily the whole part which is assessable to income tax in India is thereby relieved regardless of the amount of income there liable to taxation. I do not think that the language requires that, and I think the language which speaks of the necessity that he has paid income tax in respect of the same part of his income requires the Commissioners first to inquire what is the part of the income, and then to consider, as my Lord has said in the *Rolls Royce* case (1), whether he has in fact paid Dominion income tax on it or not. The result of any other view, unless one were driven by the language to take it, would be, as it seems to me, that, however small the sum which had been paid in India on Dominion income tax there which was paid in respect of part of his income, the whole of the income which came under review in that country, though possibly completely exempted, would have to be deducted from the United Kingdom income tax here, so that the result is that, so far from suffering dual taxation, the subject might escape a very considerable amount of taxation in both countries. Fortunately, I do not think, either on the authority of the *Rolls Royce* case (2) or on the language of this section, we are driven to that conclusion.

Appeal dismissed.

Solicitors for appellants: *Taylor & Humbert.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

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(1) 10 Tax Cas. 59, 70.

(2) 10 Tax Cas. 59.

JONES *v.* BIRCH BROTHERS, LIMITED.

(LICENSES AND GENERAL INSURANCE COMPANY, LIMITED, THIRD PARTIES.)

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[1933. J. 601.]

Practice—Third Party—Action for Damages against Motorist—Motorist insured—Policy containing Arbitration Clause—Insurance Company sought to be made a Third Party—Stay of Proceedings—Validity of Arbitration Clause, with Scott v. *Avery Addition—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 38.

The owner of a motor-car at all material times was insured against third party risks with an insurance company. The policy contained an arbitration clause with a *Scott* v. *Avery* addition which provided that "in the event of any difference between the company and the insured under this policy the same shall be referred to arbitration . . . . and the obtaining of an award shall be a condition precedent to the liability of the company under this policy." There was a collision between the motor-car and a motor-omnibus on December 22, 1932, in which a number of passengers were injured. One of the passengers in the motor-omnibus commenced an action against the owners of both vehicles. The owner of the motor-car applied for leave to issue a third party notice against the insurance company, and an order was made for the issue of a third party notice. The insurance company thereupon applied to the judge to stay the third party proceedings, and the judge, having regard to the arbitration clause and the decision of the Court of Appeal in *Freshwater* v. *Western Australian Assurance Co., Ld.* [1933] 1 K. B. 515, stayed the third party proceedings. The owner of the motor-car appealed to the Court of Appeal on the ground that the arbitration clause in the policy was of no effect under s. 38 of the Road Traffic Act, 1930 :—

Held, that an ordinary arbitration clause in a policy without the *Scott* v. *Avery* addition was unaffected by s. 38 of the Road Traffic Act, 1930, as it did not provide that any liability under the policy should cease in the event of a specified thing being omitted to be done after the event giving rise to the claim, but only that the continuing liability under the policy should be determined in a particular way according to the agreement of the parties ; and that the *Scott* v. *Avery* part of the clause was severable from the other part. The jurisdiction of the Courts was not ousted by an ordinary arbitration clause, but the practice of the Courts was to require a person, who had agreed to refer all disputes to arbitration, and afterwards brought an action on the policy, to comply with his contract and go to arbitration. In the present case the stay of the third party proceedings was right, because they might have the result of rendering the policy inoperative.

Per Scrutton L.J. The third party procedure was not applicable in the case of a person who had underwritten a policy insuring the defendants against loss. The *Scott* v. *Avery* part of the clause was merely an agreed additional way of enforcing the agreement, and was not affected by s. 38 of the Act of 1930.

Per Greer L.J. The effect of s. 38 of the Act of 1930 was to render the *Scott* v. *Avery* part of the clause inoperative for the time being.

APPEAL from an order of Swift J. at chambers.

The defendant, Fred Barnes, was the owner of a Rolls-Royce motor-car, and the defendants, Birch Brothers, Ld., were the owners of a motor-omnibus. There was a collision between the motor-car and the motor-omnibus on December 22, 1932, in which a number of passengers in the motor-omnibus were injured. The plaintiff, Ben Jones, who was a passenger in the omnibus, brought an action in the New Procedure List against the owners of both vehicles claiming damages for personal injuries and alleging negligence against both defendants, or alternatively against each of them. The writ was issued on March 10, 1933, and a statement of claim was delivered on March 29. Both defendants put in defences denying negligence or alternatively alleging negligence against the co-defendant. On May 3 Swift J., on the summons for directions, made an order that the action should be tried before himself and a jury on June 13.

The defendant Barnes was insured, in accordance with the provisions of the Road Traffic Act, 1930, against third-party risks with the Licenses and General Insurance Company. In the proposal form which he signed he warranted the truth and correctness of all the statements in the proposal form and declared that he had not withheld any material information, and he agreed " to abide by the terms and conditions of the policy issued in answer to this proposal."

The policy which was issued by the Licenses and General Insurance Company to the defendant Barnes was dated August 3, 1932, and covered the period from August 3, 1932, to August 3, 1933. The policy provided, that subject to the terms, exceptions and conditions contained therein " the company will indemnify the insured against liability at law for compensation and claimants' costs and expenses in respect of:—death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the schedule hereto (including the loading and/or unloading of such vehicle). Damage to property caused by the use of any such vehicle (including the loading and/or unloading of such vehicle) but the indemnity against liability for such damage is limited to 10,000*l.* in respect of any one claim or number of claims arising out of one cause." Then followed various specified accidents which the company were not to be liable for.

The relevant terms and conditions on the back of the policy were as follows :—

1. "The insured or his legal personal representatives shall give notice in writing to the head or any branch office of the company as soon as possible after the occurrence of any accident with full particulars thereof. Every letter claim writ summons and/or process shall be notified or forwarded to the company immediately on receipt. Notice shall also be given in writing to the company immediately the insured or his legal personal representative shall have knowledge of any impending prosecution or inquest in connection with any accident for which there may be liability under this policy."

2. "No admission offer promise payment or indemnity shall be made or given by or on behalf of the insured without the written consent of the company which shall be entitled if it so desires to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in the name of the insured for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured shall give all such information and assistance as the company may require."

6. "In the event of any difference arising between the company and the insured under this policy, the same shall be referred to the arbitration of one or two persons in accordance with the statutory provisions for the time being in force applicable thereto and the obtaining of an award shall be a condition precedent to the liability of the company under this policy.

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"If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

7. "The due observance and fulfilment of the terms provisions conditions and endorsements of this policy in so far as they relate to anything to be done or complied with by the insured shall subject to the provisions of s. 38 of the Road Traffic Act, 1930, or of s. 9 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, be conditions precedent to any liability of the company to make any payment under this policy. The insured shall repay to the company all sums paid by the company (and which have been applied to the satisfaction of the claims of third parties) in respect of any claim under this policy which the company would not have been liable to pay but for the said provisions of either of the said Acts."

The insurance company were notified of the accident and of the claims that were being made against the defendant Barnes. Correspondence then took place between the insurance company and Barnes' solicitors. Barnes was not in the car at the time of the accident: he was touring from town to town in his profession as a music-hall artiste, and there was some difficulty in getting into touch with him. Eventually the insurance company repudiated all liability in respect of all claims arising out of the accident on the ground that they had not received sufficient help and information from Barnes after the accident.

The defendant Barnes thereupon instituted third party proceedings against the insurance company to indemnify him against the claim for damages for personal injuries brought by the plaintiff Jones. An ex parte application under Order XVI.A, supported by an affidavit, for leave to issue and serve a third party notice was made to Swift J., who made the order asked for.

The Licenses and General Insurance Company thereupon applied to Swift J., under s. 4 of the Arbitration Act, 1889 (1), to stay the third party proceedings on the ground that the insurance policy contained a clause providing for arbitration, and that the obtaining of an award was a condition precedent to the liability of the company under the policy. Swift J., on May 18, considering he was bound by the decision of the

(1) Arbitration Act, 1889, s. 4: " If any party to a submission . . . . commences any legal proceedings in any Court against any other party to the submission . . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time . . . . apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Road Traffic Act, 1930, s. 35, sub-s. 1: " Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act."

Sect. 36, sub-s. 1: " In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which . . . . (*b*) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road . . . ."

Sub-s. 4: " Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

Sect. 38: " Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (*b*) of sub-s. 1 of s. 36.

Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

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Court of Appeal in *Freshwater* v. *Western Australian Assurance Co.* (1), and having regard to the arbitration clause, ordered a stay of the third party proceedings.

The defendant Barnes appealed.

The appeal was first heard on June 1 and 2 before Scrutton and Slesser L.JJ., and as there was a difference of opinion in the Court the case was ordered to be re-argued.

Edward Terrell for the appellant Barnes. So far as an action for personal injuries is concerned the arbitration clause in this policy is, by reason of s. 38 of the Road Traffic Act, 1930, of no effect between the parties, because it provides that no liability shall arise under the policy in the event of some specified thing being omitted to be done after the happening of the event giving rise to a claim under the policy. It is a condition subsequent to the event and precedent to liability, and until an award of an arbitrator has been obtained the insurance company claim that they are under no liability. Such a clause is expressly rendered of no effect by s. 38. Sect. 35 of the Act of 1930 makes it obligatory on users of motor vehicles to be insured against third party risks. Sect. 36 sets out what a policy of insurance must be in order to comply with the requirements of the Act. The policy must, under s. 36, sub-s. 1 (*b*), "insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or personal injury to any person caused by or arising out of the use of the vehicle on a road." Under s. 36, sub-s. 4, an insurance company which have issued a policy of insurance are bound to indemnify the assured, whatever recourse they may have against the assured at a later stage if they can show that but for s. 38 they would not have had to pay. The first part of clause 6 of the conditions on the policy—the arbitration clause—taken by itself would exclude the jurisdiction of the Courts. It was the kind of clause which the House of Lords in *Scott* v. *Avery* (2) held was invalid as being against public policy. The second part of clause 6 of the conditions is a condition in a policy which s. 38 of the Act of 1930 has said shall be of no effect, because it is a condition providing that in the event of some specified thing being omitted to be done after the happening of the event giving rise to a claim under the policy there shall be no liability. The clause ought not to be severed. It was said by Lord Moulton, in *Mason* v. *Provident Clothing and Supply Co.* (1), that a covenant in restraint of trade which exceeds what is reasonable can only be enforced " in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause." Swift J., in making an order staying the third party proceedings, considered that he was bound so to hold by the decision of the Court of Appeal in *Freshwater* v. *Western Australian Assurance Co.* (2) In that case the plaintiff had recovered damages against H. for injuries sustained in a motor accident. H. subsequently became bankrupt. At the time of the accident H. was insured with an insurance company against third party risks. The policy of insurance contained the usual arbitration clause making an award a condition precedent to bringing an action on the policy. The plaintiff issued a writ against the insurance company, contending that under s. 1 of the Third Parties (Rights against Insurers) Act, 1930, and s. 36, sub-s. 4, of the Road Traffic Act, 1930, they were accountable to him for the amount of the judgment. The insurance company thereupon took out a summons to stay the action on the ground that under the arbitration clause the obtaining of an award was a condition precedent to bringing the action. The Court of Appeal held that the rights of the insurance company under the policy were not affected by either of the Acts of 1930, and that the insurance company was therefore entitled to rely on the arbitration clause, which made it a condition to bringing an action that an award should first be obtained. The attention of the Court in that case was not drawn to s. 38 of the Road Traffic

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(1) [1933] 1 K. B. 515.

(2) (1856) 5 H. L. C. 811.

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(1) [1913] A. C. 724, 745.

(2) [1933] 1 K. B. 515.

Act, 1930, and the effect of that section upon a *Scott* v. *Avery* (1) arbitration clause was not discussed. If my argument in the present case is right, then the *Freshwater* case (2) was wrongly decided. A Court of Appeal is not bound by a previous decision of the Court of Appeal, where a section of an Act of Parliament has been overlooked by the Court in coming to the earlier decision : see *Smith's Case* (3), per Baggalay and Bramwell L.JJ.

[Romer L.J. referred to *Stevens & Sons* v. *Timber and General Mutual Accident Insurance Association.* (4)]

In *Israelson* v. *Dawson* (*Port of Manchester Insurance Co., Ld., Garnishees*) (5) Scrutton L.J. considered a *Scott* v. *Avery* (1) arbitration clause and what the effect of s. 38 of the Act of 1930 upon it was. If the insurance company are right in refusing to indemnify the assured against a claim brought against him for personal injuries, the assured may be made bankrupt and never have the opportunity of suing the insurance company on the policy. None of these conditions were set out in the proposal form. Farwell L.J., in *In re Bradley and Essex and Suffolk Accident Indemnity Society* (6), pointed out that it was incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay.

T. Eastham K.C. and *P. Vos* for the respondents, the insurance company.

Valentine Holmes for the plaintiff Jones.

Humfrey Edmunds for the defendants, Birch Brothers, Ld.

Scrutton L.J. Owing to the fact that we thought it necessary to have this case re-argued, as we should have been bound to do if the parties had applied to us, because there was some difference of opinion in the Court, I have had rather more opportunity than my brothers have had of considering this case and I have had sufficient time to put my provisional views into writing. I have listened very carefully to the second edition of Mr. Terrell to see whether it has in any way altered my views, and, as it has not, I am enabled—whether it is an advantage or not—to give a more considered view of the matter, in writing, than my brothers are.

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(1) 5 H. L. C. 811.

(2) [1933] 1 K. B. 515.

(3) (1879) 11 Ch. D. 579, 593, 596.

(4) (1933) 102 L. J. (K. B.) 337.

(5) [1933] 1 K. B. 301.

(6) [1912] 1 K. B. 415, 430.

This appeal is intended to raise questions, which when raised will be of general importance and may ultimately have to be answered by a higher tribunal.

There was a collision between a motor-car owned by one Barnes and a motor-omnibus owned by Birch Brothers, Ld., in which a number of passengers in the omnibus were injured. One action by a passenger against the owners of both vehicles was brought in the county court, resulted in a judgment against Barnes, and is now under appeal. The present action by another passenger also against both owners is in the New Procedure List, a writ being issued on March 10, 1933, and a statement of claim delivered on March 29. On May 3 Swift J. on the summons for directions made an order that the case should be tried before himself without a jury on June 13. For some reason not stated the costs of this order were ordered to be paid by the defendant Barnes. On May 11 counsel for Barnes applied ex parte for leave to issue a third party notice against his insurers, The Licenses and General Insurance Company. The policy contained as a condition clause 6: " In the event of any difference arising between the company and the insured under this policy the same shall be referred to arbitration [as provided in the clause] and the obtaining of an award shall be a condition precedent to the liability of the company under this policy." The insurance company thereupon applied to the judge to stay the third party proceedings under the arbitration clause; and the judge did so, both because of the arbitration clause, and, we are told, because he was of opinion he was bound by a decision of this Court in *Freshwater's* case. (1)

The defendant appeals to this Court and asks that the order of Swift J. should be reversed. The order " to stay "

(1) [1933] 1 K. B. 515.

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is probably formally right, as if the party who asks for a stay does not proceed with diligence, the Court may remove the stay and let the proceedings go on. But in the similar case of an ex parte order for service out of the jurisdiction, the Court on hearing the proposed defendant does not "stay" the service of the writ, but rescinds the leave to serve it. The defendant here argues that the third party procedure should not be stayed, as he alleges that the arbitration clause and the *Scott* v. *Avery* (1) addition to it, that the obtaining of an award shall be a condition precedent to the liability of the company under the policy, are of no effect under s. 38 of the Road Traffic Act, 1930.

The history of the procedure by defendants against their insurers stands thus up to 1928, when the Third Party Procedure Rules were amended. In *Nelson* v. *Empress Assurance Corporation* (2), where an original insurer failed in an attempt to bring in a reinsurer under the third party procedure, Mathew L.J., reversing Bigham J., said (3): "The rule under which the application to bring in the third party is made has been in existence for many years, and policies of reinsurance have been in existence for a still longer period, but this appears to be the first occasion on which it has been sought to apply the rule in the case of such a policy." In *Clover, Clayton & Co.* v. *Hessler & Co.* (4) I said, stating my knowledge of the general practice in insurances: "The third party procedure is limited to claims for indemnity or contribution, and there is, I believe, no reported case, and I never heard of a case, in which persons have been joined as third parties merely because they have underwritten a policy insuring the defendant against the loss which gives occasion for the plaintiff's claim." In 1927, in *Gowar* v. *Hales* (5), this Court refused third party procedure on the ground stated in the headnote, which reads thus: "As a general rule, in the absence of special circumstances, the insurance company which has issued a motorist's insurance policy should not be brought in as a third party at the hearing of an action for damages by the injured party against the motorist. It is a well established rule of practice at the Bar, enforced by the judges, that in an action against a motorist the jury should not be informed that the defendant is insured." One of the circumstances relied on as supporting the practice was the professional rule of conduct that a jury should not be told that the defendant was insured, and the decisions that a breach of this rule justified the judge in discharging the jury, and ordering the plaintiff to pay the costs thrown away: *Askew* v. *Grimmer* (1) and *Wright* v. *Hearson.* (2) The presence of the insurance company at the trial told the jury of the insurance and was therefore objectionable. What happened in practice was that the insurance company either after knowing the facts defended the action in the name of the defendant, or where they did not admit liability left the defendants to establish their liability by arbitration when the Court would enforce the award. Passing over for the moment the legislation of 1928 (R. S. C., Order 16A) and 1930 (Statutes), in 1932 in *Golding* v. *London and Edinburgh Insurance Co.* (3) this Court stayed an action against an insurer in a case where the policy contained a *Scott* v. *Avery* (4) clause, holding that there was nothing in *Jureidini* v. *National British and Irish Millers Insurance Co.* (5) to prevent them from doing so. Fortunately in this appeal the decision in *Jureidini's* case (5) has not been relied on, counsel probably thinking that after the decisions in *Golding's* case (3) and *Freshwater's* case (6) he could not rely on it.

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(1) 5 H. L. C. 811.

(2) [1905] 2 K. B. 281.

(3) [1905] 2 K. B. 285.

(4) [1925] 1 K. B. 1, 8.

(5) [1928] 1 K. B. 191.

The circumstances I have passed over are, firstly, the alteration of the Third Party Rule in May, 1929, by extending the rule beyond "contribution and indemnity." This may have removed some of the previous objections to third party procedure against insurers, but did not touch the objection to the effect on the jury of the fact that the defendant was insured. Secondly, the effect of the two statutes of

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(1) (1927) 43 Times L. R. 354.
(2) [1916] W. N. 216.
(3) (1932) 43 Ll. L. Rep. 487.
(4) 5 H. L. C. 811.
(5) [1915] A. C. 499.
(6) [1933] 1 K. B. 515.

1930, the Third Parties (Rights against Insurers) Act (20 & 21 Geo. 5, c. 25), and the Road Traffic Act (20 & 21 Geo. 5, c. 43), ss. 36 and 38, which came into force on January 1, 1931, before the policy in the present case was issued. The Third Parties (Rights against Insurers) Act, 1930, was passed to prevent the party injured by the motorist, called a "third party," from losing his right to the sum recovered against the motorist, if the latter became bankrupt, and his property went to the general body of his creditors. The Act only applies if the insured becomes bankrupt or makes a composition or arrangement with his creditors, in which case the insured's rights against the insurer under the policy are to be transferred to the "third party." In my opinion, *Freshwater's* case (1) has decided that this Act does not affect the terms of the policy transferred, which except as to the addition of another person who can sue on the policy still remains in force.

In the present case, Mr. Barnes, the insured, is not bankrupt, nor, except that he is the owner of a Rolls Royce car, not exactly a sign of impecuniosity, is there any evidence that he is likely to be. The plaintiff in the present action has therefore no rights at present under the policy, or interest in joining the insurance company as third parties.

The Road Traffic Act, 1930, whose preamble states (inter alia) it is "to make provision for the protection of third parties against risks arising out of the use of motor vehicles," by s. 35 enacts that no person shall use a motor vehicle on a road unless he is insured against third party risks. Sub-s. 4 of s. 36 reads : "Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons." I have read that section several times without understanding what it means. Then follows s. 38, the material words of which for this purpose are: "Any condition in a policy or security issued or given for the

(1) [1933] 1 K. B. 515.

purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (*b*) of subsection (1) of section thirty-six: Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

I take first the ordinary arbitration clause, that is to say, the first part of condition 6 down to the words "applicable thereto." The practice of the Courts on this clause is that they do not treat it as ousting their jurisdiction, but, as it is desirable in the public interest that people who make legal contracts should keep them, they stay the action and refer the dispute to arbitration under the agreement, unless special circumstances are shown why the agreement should not be observed: see per Lord Hanworth in *Freshwater's* case. (1) I said myself in *Gowar* v. *Hales* (2): "But there is an arbitration clause in the policy which means that the assured has agreed to the term of the policy that disputes between him and the insurance company shall be settled by arbitration. Now that does not oust the jurisdiction of the Courts if they think fit to allow an action; but it is a general principle that people who make contracts should keep them rather than break them, and the owner of a motor-car who, having agreed in a policy to settle a dispute by arbitration, does not do it but goes to law, is breaking his contract; and the general principle therefore on which the Courts act is that, unless there are special circumstances, they invite the person who brings an action to comply with his contract and go to arbitration." There are many other authorities to the same effect.

(1) [1933] 1 K. B. 519, 520. (2) [1928] 1 K. B. 198.

I am unable to see how the ordinary arbitration clause without the *Scott* v. *Avery* (1) addition is affected by s. 38 of the Road Traffic Act, 1930. It does not, in my opinion, provide that any liability under the policy shall cease in the event of a specified thing being omitted to be done, but only that the continuing liability under the policy shall be determined in a particular way according to the agreement of the parties unless the Court otherwise orders. Nor, in my opinion, does the *Scott* v. *Avery* (1) part of the condition, which, in my opinion, is severable from the other part of the condition, make the matter worse. It is an agreed additional way of enforcing the agreement of the parties. What will happen if the matter goes to arbitration ? An award will result enforceable by action and any difficulty of the absence of an award under condition 6 will disappear. If the award is in favour of the insured there is no difficulty ; if it is against him on the facts of the accident, it is the tribunal he has agreed to and must accept ; if it is against him for breach of conditions after the accident, such as conditions 1 and 2, he can raise by special case the point of law whether those conditions are inoperative by reason of s. 38. Any point that condition 6 is inoperative by reason of s. 38 cannot arise, for there will be an award as agreed.

I do not think it is necessary to determine finally what is the effect of the proviso to s. 38. I have an impression that the draftsman did not quite understand what he meant to do, and has not unnaturally left it doubtful what he has done. I find it difficult to think that on the original claim between insured and insurer, at a time when the injured plaintiff has no rights, Parliament intended to alter the contract between insured and insurer in the claim, but to allow the insurer to counterclaim against the bankrupt insured as if the conditions of the policy were not altered.

In my opinion Swift J. came to a right result in staying the third party proceedings, and the insured must be left to the arbitration he has agreed to. The appeal should be dismissed.

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(1) 5 H. L. C. 811.

GREER L.J. I agree that this appeal should be dismissed. I assume, without deciding it, that if there were no *Scott* v. *Avery* clause in this policy the third party procedure under Order 16A, r. 1, would be a possible way of determining the rights as between the insurer and the assured. But I have come to the conclusion that this is a case in which litigation between the insurer and the assured should be restrained by the Court, because the parties have agreed that their rights shall be determined not by litigation but by an arbitrator.

Now I have considered the effect of the *Scott* v. *Avery* (1) clause having regard to the recent statutes, the Third Parties (Rights against Insurers) Act, 1930, and the Road Traffic Act, 1930. I think it is clear, if one reads the decision of the House of Lords in *Scott* v. *Avery* (1), that that case means this. At that time it had been clearly demonstrated that the Courts would not permit their jurisdiction over causes of action to be interfered with by the agreement of the parties, and therefore insurers and other contractors invented the *Scott* v. *Avery* (1) form of contract in order to get rid of that difficulty, and did that successfully, because they said the contract in the *Scott* v. *Avery* (1) form gives rise to no legal liability until there is an arbitration and an award and a refusal by one party to the contract to abide by and perform the award that has been made. I think that is clearly the decision of the House of Lords in *Scott* v. *Avery.* (1) It is put in this way by Lord Cranworth L.C. (2): "Now this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration." Now in the present case, before the Third Parties (Rights against Insurers) Act, 1930, was passed, nobody was concerned with the contract of insurance except

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(1) 5 H. L. C. 811.

(2) Ibid. 847.

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the insurer and the assured, and they could put into the policy any terms both parties agreed to, and both parties would under all circumstances be bound by the terms to which they had agreed, and no one who was not a contracting party could get any advantage whatever from the contract of insurance. But it was thought that that was an unfortunate position as regards persons who were injured by the negligence of an insured person if that insured person became bankrupt. It did not seem just that the insurance moneys should go to swell the dividends of the general creditors of the bankrupt. It was considered right that under those circumstances if any insured moneys were due to the insured person they should go to the person who was damaged by his negligence, and accordingly it was provided by s. 1 of the Third Parties (Rights against Insurers) Act, 1930, that: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then:—(*a*) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors . . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred and vest in the third party to whom the liability was so incurred." That vesting of the right of action in the third party only takes place in the event of the insured person becoming bankrupt. When the Legislature came to pass the Road Traffic Act of 1930 it was thought that that provision might prove to be of very little advantage to the injured person because he had not had an opportunity of seeing the policy, and therefore did not know what was in it, and consequently assumed that it was an indemnity against any accidents that might happen, and any injuries that might be caused through the negligence of the insured. Therefore for his protection s. 38 of the Road Traffic Act, 1930, was passed in these terms: "Any condition in a policy or security issued or given for the purposes of this Part of this

Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (*b*) of sub-s. 1 of s. 36." Those are claims in respect of an accident covered by the policy. I find some difficulty in reading that section without making it apply to a *Scott* v. *Avery* (1) clause, because a *Scott* v. *Avery* (1) clause is something which has to be done after the happening of the event giving rise to the claim, namely the act causing the damage. I am inclined to think, though it is unnecessary to decide it, that the effect of that section is that the *Scott* v. *Avery* (1) part of the clause is rendered inoperative for the time being, though subject to the proviso. I think, however, that it is unnecessary to decide that point because, even if it is doubtful whether that result would follow, I think that there should be a stay of the third party proceedings, because they might have the result of rendering the policy inoperative if the action were allowed to proceed; whereas if the arbitration proceeds the policy would not become inoperative by reason of the *Scott* v. *Avery* (1) clause. Then s. 38 goes on to provide as follows—and this is a very odd provision—: "Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties." Now there is such a provision in the present policy, and the effect of that provision seems to me to be that assuming there is a provision in the policy which renders it inoperative, in the event of no award being obtained, then the liability of the company to pay in the arbitration only has the effect that the insurance company can then recover the amount from the person insured; that is to say, if the insurance company are called

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(1) 5 H. L. C. 811.

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upon, as they may be called upon, to pay to the injured person any sums which under the policy they would not be liable to pay, they can then recover from the person insured the amount which the statute has forced them to pay to the person who is injured. But however this may be, I agree with my Lord that the condition under this policy with regard to arbitration is one that can be severed and, if necessary, it can be held that that part of the clause which agrees to arbitration is unaffected by s. 38, though the *Scott* v. *Avery* (1) part of the clause is rendered void for certain purposes by s. 38. If that be so, it is merely a case where the learned judge had to deal with a contract containing an arbitration clause and to exercise his discretion, on the principles laid down in the *Freshwater* case (2), whether or not that was the tribunal which the parties had agreed should decide the question in dispute between the parties instead of a Court of justice.

I agree that the decision of the learned judge was right.

ROMER L.J. I agree that Swift J. came to a right conclusion. It is said on behalf of the appellant that what has been called the *Scott* v. *Avery* (1) addition to this arbitration clause is rendered invalid by s. 38 of the Road Traffic Act, 1930. Now during the argument of Mr. Terrell, and notwithstanding that argument, I felt inclined to decide that the section has no operation upon that addition for reasons that I ventured to indicate to Mr. Terrell. But after his argument closed I was informed by Mr. Valentine Holmes that there were some observations in a decision in the House of Lords which were inconsistent with the reasons that I was suggesting. I have not had an opportunity of considering that case and therefore I think it better not to express any opinion as to what effect, if any, s. 38 has upon the *Scott* v. *Avery* (1) addition to the arbitration clause. I will assume that it renders it void. We have therefore an ordinary arbitration clause unaffected by the *Scott* v. *Avery* (1) addition, the addition being, in my opinion, clearly severable from the rest of the clause. That being so, I can see no reason why in the exercise of the Court's discretion the plaintiff should not be compelled to carry out the contract that he deliberately entered into and have the dispute between him and the insurance company decided by arbitration. There is indeed in this particular case a further and I think a very strong reason why he should be so compelled. As has been pointed out, condition 7 endorsed on the back of the policy provides as follows : "The insured shall repay to the company all sums paid by the company (and which have been applied to the satisfaction of the claims of third parties) in respect of any claim under this policy which the company would not have been liable to pay but for the said provisions of either of the said Acts." That is the clause the insertion of which in the policy is recognized as being a proper clause to be inserted by the proviso to s. 38. Now supposing this third party procedure goes on and the reference to arbitration is not made, the insurance company will be met no doubt by the plea of the invalidity of the *Scott* v. *Avery* (1) addition, and on the defendant's claim against them in the third party proceedings they would be held liable. Then they would say : Now we have been held liable to pay you by way of indemnity what you have been ordered to pay to the plaintiff in the action, and inasmuch as we should not have been liable to pay you anything if it had not been for the provisions of s. 38, you have to pay it back to us. There would be no answer to that, because there would have been no arbitration, and but for the provision of s. 38, the absence of the arbitration would be a complete answer to the plaintiff's claim. The result would be that there would then have to be an arbitration to see how the matters should be ultimately adjusted as between the defendant who has issued these third party proceedings and the insurance company. Very similar considerations to these induced us in the *Freshwater* case (1) to stay the proceedings and refer the matter to arbitration.

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(1) 5 H. L. C. 811.

(2) [1933] 1 K. B. 515.

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(1) 5 H. L. C. 811.

For these reasons I agree that the appeal fails.

Appeal dismissed.

Solicitors for appellant: *J. E. Holloway-Pike & Co.*

Solicitors for respondents: *William Charles Crocker.*

Solicitors for plaintiff: *Barlow, Lyde & Gilbert.*

Solicitors for defendants, Birch Bros., Ltd.: *Kenneth Brown, Baker, Baker.*

R. F. S.

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14, 28.

BRITISH RUSSIAN GAZETTE AND TRADE OUTLOOK, LIMITED *v.* ASSOCIATED NEWSPAPERS, LIMITED.

[1931. B. 3155.]

TALBOT *v.* SAME.

[1931. T. 1257.]

Accord and Satisfaction—Mutual Promises—Warranty of Authority—Breach—Costs—Appeal by Leave of Judge—Exercise of Discretion.

Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged, and the satisfaction is the consideration which makes the agreement operative. It is not necessary that the consideration should be executed; the consideration on each side may be an executory promise, the two mutual promises making an agreement enforceable at law.

T., who owned a paper, formed a company with a capital of 500*l.* in 1*l.* shares, and transferred his paper to the company in consideration of the allotment to him of the 500 shares. T. gave Miss P., who was the editor of the paper, 475 shares, retaining 25 shares himself. T. and Miss P. were the directors of, and the only shareholders in, the company. The defendants published in one of their papers two articles which T. considered to be a libel upon himself and the company to which he had transferred his paper. T. and the company commenced actions for libel against the defendants. There was a meeting between T. and H., a representative of the defendants, with the object of settling the litigation, and eventually terms of settlement were arranged on October 10, 1932,

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(1) [1933] 1 K. B. 515.

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and initialled by T. and H. The terms, which were headed with the names of the two actions, provided: "I accept the sum of 1000 guineas on account of costs and expenses incurred in full discharge and settlement of my claims against" the defendants "and the claims of the" company "and the officers of that company, arising out of the articles published in the Daily Mail . . . . and I will forthwith instruct my solicitors to serve notice of discontinuance, or to take such other steps or to agree to such other steps being taken to end the proceedings now pending." Provision was also made for a letter in the terms of an agreed draft to be written to T. by H. The plaintiff company and Miss P. did not agree to the proposed settlement, although the defendants were ready and willing to carry out the settlement, and the actions proceeded to trial. The defendants counterclaimed against T. for breach of warranty of authority. The jury returned a verdict for both T. and the plaintiff company, and judgment was entered for each of the plaintiffs with costs. The Court of Appeal, however, held that the alleged libel was not a libel on the plaintiff company, and set aside the judgment in favour of the plaintiff company. The judge at the trial held that T. represented and warranted that he had authority to settle the action on behalf of the plaintiff company whereas in fact he had no such authority, and the defendants were entitled to an inquiry as to the damages they had thereby sustained. The defendants appealed (inter alia) by leave of the trial judge, on the question of costs in both actions. The plaintiff T. appealed against the judgment against him for damages for breach of warranty of authority on the ground that he had never represented that he had authority to settle the action on behalf of the plaintiff company, and because the transaction relied on in the counterclaim was only an executory accord giving rise to no rights:—

Held, (1.) that inasmuch as the trial judge had exercised his discretion as to costs, the Court of Appeal could not interfere with that exercise of the judge's discretion, notwithstanding that the trial judge had given leave to appeal.

(2.) That the document initialled by T. and H. on October 10, 1932, was an agreement in which the consideration on each side was an executory promise by the other side, and further, a third party was included in the promise. The agreement was therefore enforceable in law, at any rate by counterclaim.

(3.) That inasmuch as T. warranted that he had the authority that he professed to have, whereas in fact he had not that authority, he had broken his warranty and was liable in damages.

Collen v. *Wright* (1857) 8 El. & Bl. 647; *Starkey* v. *Bank of England* [1903] A. C. 114; and *Firbank's Executors* v. *Humphreys* (1886) 18 Q. B. D. 54 applied and followed.

APPEALS from decisions of Avory J. on a trial with a special jury.

The plaintiff, Stafford Cecil Talbot, was a British citizen who had formerly been the representative in Russia of

English firms trading with Russia. At the date of the Russian Revolution he had a large sum of money invested in Russian securities which was confiscated by the revolutionary government. After the war he helped to form the Association of British Creditors of Russia with the object of helping the creditors to recover the money they had lost. Miss L. I. Parker was the secretary of this Association. The plaintiff was also the proprietor of a paper called, when it first came out in 1920, The Russian Gazette, which was published for the purpose of informing British people of the conditions in Russia. The name of this paper was changed in 1922 to The British Russian Gazette, and in 1923 to The British Russian Gazette and Trade Outlook. Miss Parker was the editor of this paper. The plaintiff Talbot was then an active opponent of the Soviet Government and of the proposal to make British loans to Russia.

By April, 1925, Talbot had changed his views and had come to the conclusion that it was better to conciliate the Soviet Government and their representatives in order to obtain the end which he had in view—namely, the recovery of his own money and that of other British creditors. He accordingly formed the Anglo-Russian Conciliation Association, of which he became the organising director and Miss Parker the secretary, and he advocated his changed views in his paper. He subsequently became on friendly terms with the representatives of the Soviet Government, and obtained certain privileges from them in Moscow beginning in 1928. The Soviet Government bought a number of copies of Talbot's paper for circulation in Russia to Government offices. Talbot had visited Russia several times since 1926.

In February, 1930, Mr. Talbot formed a small private company, the British Russian Gazette and Trade Outlook, Ld., with a capital of 500*l.* in 1*l.* shares. Mr. Talbot transferred all his rights in his paper The British Russian Gazette and Trade Outlook to this company in consideration of the allotment to him of the whole of the 500 1*l.* shares. Mr. Talbot gave 250 of these shares to Miss Parker, who remained editor of the paper, and subsequently he transferred a further 225 shares to her as a gift, leaving himself the owner of only 25 shares. The paper described itself as published by the company; Talbot and Miss Parker, directors. They were the only shareholders. Miss Parker managed the business, but there was no formal appointment of her as managing director. There was no change of policy or management of the paper following the incorporation of the company.

In June, 1931, Talbot was asked by the British Broadcasting Corporation to broadcast on Russia and how the five years' plan had been worked in industry. Talbot submitted a draft of his address, which was revised and approved by the B. B. C., and he delivered the broadcast address on June 29.

The defendants, the Associated Newspapers, Ld., were the printers and publishers of a paper called the Daily Mail having a large circulation in the United Kingdom and elsewhere.

In the issue of the Daily Mail of June 30, 1931, the following article appeared :—

"MOSCOW HATER OF BRITAIN NOW IN LONDON."
"SIMPLE 'SCIENTIST' UNMASKED."
"BUKHARIN, HEAD OF THE HATE FACTORY."
"MR. CHURCHILL ON SOVIET WAR PLANS."
"PUTTING IT ACROSS THE B. B. C."

"Bukharin, the inveterate foe of the British Empire and, until recently, Propagandist-in-chief of the Soviet Government, is in England on a visit from Moscow in the guise of a 'simple scientist.'

"While this concocter of anti-British diatribes was presumably engaged in scientific research in some undisclosed place, Russians were being entertained at a garden party in London.

"Mr. Churchill in Parliament last night, as reported on page 12, revealed that Russia is importing war metals, such as nickel and aluminium, at an alarming rate. He showed that Russia is the ominous shadow overhanging the peace of Europe.

" Not long after Mr. Churchill had spoken on the Moscow menace to Europe's peace there was an extraordinary contrast at the B. B. C. A certain Mr. Stafford C. Talbot was introduced to listeners and occupied nearly 20 minutes—at the best hour of the evening—in delivering in the most glowing terms an address about Soviet Russia's industrial plans.

"The uninformed were led to believe that Russia at present is a land flowing with milk and honey. Not a word about the slavery conditions there ; only a mass of statements to Moscow's advantage.

" If Stalin was listening he must have rocked with laughter at the way his supporters succeed in ' putting it over ' even the British Broadcasting Corporation.

" Everybody will ask : How is it arranged ? "

The issue of the Daily Mail of July 1, 1931, contained the following article :—

"QUEER.

The public is becoming more than a little restive at the fatuity with which persons of some authority in this country are allowing themselves to be manipulated by Soviet influence. The Privy Council has just decided to allow that dangerous Bolshevik, Bukharin, who is masquerading as a ' simple scientist,' to visit this country and to remain over here for three months without having to register or to report his presence. The man is a well-known propagandist and enemy of this country.

Why should the Privy Council thus go out of its way to help Moscow ? And why should a semi-public institution such as the British Broadcasting Corporation allow—as it did on Monday night—a lecture to be broadcast throughout the country which was obviously of Soviet propagandist character.

FRIEND OF SOVIET.

MOSCOW'S FAVOURS FOR MR. TALBOT.

Mr. Talbot is the proprietor of the ' British Russian Gazette and Trade Outlook,' a monthly journal devoted to the development of Soviet trade.

He organised the Association of British Creditors of Russia, for which he was vice-chairman until the general election, 1924, when he made an arrangement with the Soviet.

He has since visited Russia many times under Soviet auspices and has been the recipient of much praise for his work on behalf of Soviet interests in this country.

As a sign of appreciation the Soviet has given Mr. Talbot permission to open an office at Moscow for his journal, through which it is proposed to disseminate information on Russia to British interests."

The British Russian Gazette and Trade Outlook, Ld., commenced an action against the defendants claiming by their writ damages for slander of title, and the plaintiff Talbot commenced an action claiming damages for libel.

In the statements of claim the plaintiffs alleged that the defendants falsely and maliciously caused to be printed and published of and concerning the plaintiffs in the issue of the Daily Mail of June 30 and July 1, 1931, the statements set out above.

The innuendo placed upon the words in the plaintiff company's statement of claim was that "the said words meant and were understood to mean that the said Stafford Cecil Talbot was a British subject who was disloyal to his country and who took part in and aided and abetted the concoction of anti-British diatribes and the propaganda work of the Soviet Government under whose control the plaintiff company and the British Russian Gazette and Trade Outlook were. And that the said Talbot was in the receipt of financial and other benefits from the Government of Russia for those purposes which the said Talbot was engaged in carrying out and in so doing was deceiving the British Broadcasting Company and that the plaintiff company and the said British Russian Gazette and Trade Outlook were a mere cloak for such activities of the said Stafford Cecil Talbot and existed for no other purpose."

A similar innuendo was contained in the plaintiff Talbot's statement of claim, except that the references to the plaintiff company and the paper were omitted, and it concluded with the words "and that the plaintiff [Talbot] was a man who

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British Russian Gazette, etc., Ld. v. Associated Newspapers, Ld.
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could not be trusted and with whom no respectable British citizen ought to have anything to do."

The defendants pleaded that the words were incapable of the alleged meanings or any other defamatory meaning, and were no libel on either of the plaintiffs; that they were according to their natural and ordinary significance true in substance and in fact; and that so far as the words consisted of expressions of opinion they were fair comments made in good faith and without malice upon facts which were a matter of public interest.

The two actions were consolidated on December 10, 1931.

Through the intervention of mutual friends the plaintiff Talbot met Mr. Kenneth Henderson, the manager of the legal department of the defendant company, at dinner at the Junior Carlton Club on October 6, 1932, with the object of trying to compromise the litigation. Mr. Henderson offered to pay costs if the actions were withdrawn, but said that on no account would he pay anything by way of damages. Talbot said that he and the company had incurred considerable expense in gathering material and making inquiries beyond what they would have to pay their solicitors. Mr. Henderson also said that he would write Talbot a letter to the effect that the Daily Mail did not impute disloyalty to him, which letter Talbot could show his friends, but that the Daily Mail would not publish a statement. It was then agreed that the plaintiff and Mr. Henderson should have lunch at the Savoy on October 10 to see whether they could settle on that basis.

On October 10 Mr. Henderson produced at the Savoy a draft of the letter and a draft of the terms of settlement which he and the plaintiff Talbot went through word by word and made several alterations which were initialled by both. After discussion the amount to be paid by the defendants as costs was agreed at 1000 guineas.

The terms of settlement as agreed were as follows:—

"*British Russian Gazette and Trade Outlook, Ld., and Talbot* v. *Associated Newspapers, Ld.*

I accept the sum of one thousand guineas on account of costs and expenses incurred in full discharge and settlement of my claims against Associated Newspapers and the claims of the British Russian Gazette and Trade Outlook, Ld., and the officers of that company, arising out of the articles published in the Daily Mail of June 30, 1931, and July 1, 1931, and I will forthwith instruct my solicitors to serve notice of discontinuance, or to take such other steps or to agree to such other steps being taken to end the proceedings now pending.

It is understood and agreed that a letter in the form of the draft initialled by me and by Mr. Henderson on behalf of the Daily Mail, shall be written to me by Mr. Henderson, and that no other reference to this amicable settlement of the dispute shall be published in the Daily Mail or in the British Russian Gazette and Trade Outlook.

S. C. T.
K. H."

The draft letter initialled by the plaintiff Talbot and by Henderson and referred to in the terms of settlement was as follows :—

" Dear Mr. Talbot,—

I am glad I have had the opportunity of meeting and discussing with you the articles published in the Daily Mail of June 30, 1931, and July 1, 1931.

You know the views of the Daily Mail in regard to Russia and Soviet propaganda, and those views we maintain.

The fact that your name was mentioned in the articles was wholly due to the fact that your broadcast address happened to be made on the same evening as Mr. Churchill spoke on Russia in the House of Commons.

Nothing in the Daily Mail articles imputed or was intended to impute any act or thought of disloyalty on your part, or that you had in any way abandoned your interest in the claims of British creditors of Russia.

This is a personal letter and not for publication but of course there is no objection to your showing it to any friend who is interested in the dispute, which arose apparently

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out of a misapprehension created by two passages in the Daily Mail articles. As that misapprehension has now been removed there is, as we agree, no necessity for the litigation to continue.

Yours truly,
S. C. T.
K. H."

Apparently the plaintiff could not procure Miss Parker's consent to the settlement, because on the same day, October 10, the solicitors for both the plaintiffs wrote to the defendants' solicitors "that both you and your clients must be well aware that Miss L. I. Parker, representing the British Russian Gazette and Trade Outlook, Ld., was no party to this suggested settlement and therefore as far as the plaintiff paper is concerned the action will proceed in the usual way."

The plaintiffs' solicitors wrote again on October 11: "We have now been placed in possession of the terms of settlement initialled by Mr. Talbot. Firstly, it is clear that Mr. Talbot's action is settled, the consideration being the payment to him of 1000 guineas. Secondly, whatever undertaking was given by Mr. Talbot to try and persuade the British Russian Gazette and Trade Outlook, Ld., to drop their action, the defendants were fully aware of the fact that Mr. Talbot could not bind the company, the second plaintiffs, by any agreement made without the assent of Miss L. I. Parker, who owns practically all the shares in the company and is the managing director and editor of the company, and therefore your clients cannot complain if Mr. Talbot has failed to persuade the company, the second plaintiffs, to drop an action for which they are to receive no compensation whether in the shape of an apology, damages or costs. Mr. Talbot was not an authorised agent of the second plaintiffs for the purpose of settling their action. . . . . The British Russian Gazette and Trade Outlook, Ld., is quite unfettered by what has taken place with Mr. Talbot. . . . . This action is not being continued for the purpose of getting money. Your clients have published a falsehood against the

British Russian Gazette. If your clients apologise for that and pay the costs, they will not be asked for more."

The defendants' solicitors replied on October 13: "We think that you have misread the terms of the agreement of compromise. The consideration moving from our clients was for the settlement of both the actions and cannot be attributed to one action only, as you seek to do. You appear also to have overlooked the fact that the amount for costs and expenses was arrived at by reason of Mr. Talbot's express representation that the company and Miss Parker had both incurred expenses in the matter in addition to the expense to which he had been put and was fixed at a figure to include the whole. Our clients were not and are not aware that Mr. Talbot could not bind the company. If he could not bind the company we fail to understand why he represented that he could do so. The document itself shews that he was binding the company, and we are informed that no word was said as to his trying to persuade the company to agree to the settlement. If Mr. Talbot has not bound the company, and in our view he has done so, he will certainly be liable to our clients for breach of warranty of authority. We repeat that we are prepared to pay the thousand guineas and to hand over Mr. Henderson's letter in the agreed terms in full discharge of all claims of Mr. Talbot and the company as set out in the compromise agreement."

The defendants thereupon on October 20, 1932, applied to a Master for an order that all further proceedings in the consolidated action be stayed on the ground that the parties had agreed to compromise. The Master, however, made no order, but gave the defendants liberty to amend their defence and for the plaintiffs to deliver a reply thereto.

The defendants amended their defence and pleaded that the plaintiffs and each of them had agreed with the defendants that the consolidated action should be compromised on terms agreed and set out in documents initialled by the plaintiff Talbot and Mr. Henderson. They also counterclaimed against the plaintiff Talbot damages for breach of warranty of authority.

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The plaintiffs by their reply denied that the documents initialled by the plaintiff Talbot and by Henderson ever constituted or were ever intended to constitute a compromise or settlement of the consolidated action, and that they were at all times subject to and conditional upon the approval and consent of the plaintiff company and Miss Parker, and that the plaintiff Talbot never purported to bind them, and that neither the plaintiff company nor Miss Parker in fact approved or consented to the terms of compromise.

The consolidated action was tried before Avory J. and a special jury on January 25, 26, 27, February 1 and 2, 1933.

At the close of the plaintiffs' case counsel for the defendants submitted that the words complained of were not capable of a defamatory meaning in relation to the plaintiff company. Avory J. said: "I am not prepared to say that the words are not capable of some defamatory meaning on the company, although I have grave doubt about it."

The questions which were left to the jury with their answers were as follows:—

Q. 1. Did these publications or either of them expose the plaintiff to hatred, contempt, or ridicule, or had they a tendency to injure him in his profession or trade? (A.) Yes.

Q. 2. Were the alleged facts and which of them true or untrue?

(*a*) Was the plaintiff putting it across the B. B. C.? (A.) Untrue—fact.

(*b*) Were the uninformed led to believe that Russia at present is a land flowing with milk and honey—not a word about the slavery conditions there—only a mass of statements to Moscow's advantage? (A.) Untrue—fact.

(*c*) Was the plaintiff a supporter of Stalin in making his broadcast speech? (A.) Comment.

(*d*) Was the lecture of a Soviet propagandist character? (A.) Comment.

(*e*) Was the plaintiff a friend of the Soviet and receiving favours from Moscow? (A.) True—fact.

(*f*) Was the plaintiff Talbot proprietor of a journal devoted to the development of Soviet trade? (A.) True—fact.

(*g*) Did he make an arrangement with the Soviet Government after the General Election of 1924? (A.) True—fact.

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(*h*) Has he visited Russia under Soviet auspices, and been the recipient of praise for his work on behalf of Soviet interests in this country? (A.) Untrue—fact.

(*i*) Did the Soviet Government give permission to Talbot to open an office in Moscow as a sign of appreciation? (A.) True—fact.

Q. 3. Assuming the facts are correctly stated, are the publications fair comment on a matter of public interest? (A.) Unfair.

Q. 4. Did Talbot on October 10, 1932, say that he was making the agreement provisionally, subject to the approval of Miss Parker, and that he could not bind her or the plaintiff company? (A.) No.

Q. 5. If Talbot is entitled to succeed in this action, what damages? (A.) One thousand pounds.

Q. 6. Are the publications, or either of them, defamatory of the plaintiff company, and if so, what damages? (A.) Yes. —One hundred pounds.

On February 8 Avory J. delivered the following judgment:—

This case was troublesome enough at the trial, but it has become even more troublesome when I have to consider in what form judgment should be entered.

I will first deal with the question of whether there is, in this case, sufficient ground for my departing from the ordinary rule that the successful party should be entitled to the costs. Although I have a very strong opinion that both the plaintiff Talbot and the plaintiff company, through their solicitors, have been guilty of conduct which is blameworthy, I am not satisfied that that conduct has increased the costs of this litigation. Therefore, I am not prepared to make any special order to deprive either the plaintiff Talbot or the plaintiff company of their costs. Accordingly, I give judgment for the plaintiff Talbot for 1000*l*. with costs, and for the plaintiff company for 100*l*. with costs. I have

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so much doubt whether there are any grounds in this case which would justify me in depriving both these plaintiffs either of their costs or of part of them, that if the defendants ask for it I would give them leave to appeal on the question of costs.

There remains the question which arises upon the answer of the jury to the fourth question which was put to them, which was: Did Talbot on October 10, 1932, say that he was making the agreement provisionally, subject to the approval of Miss Parker, and that he could not bind her or the plaintiff company? The jury have definitely answered that question in the negative. In those circumstances I hold, first of all, that upon the construction of this document of October 10, 1932, the plaintiff Talbot was representing and warranting that he had authority to settle both these actions, and particularly that he had authority to settle the claim of the company, the British Russian Gazette and Trade Outlook, Ld. It is also clear that there was a breach of that representation and warranty by Mr. Talbot, because I find and hold that in fact at that time he had not the authority of the company to settle the action on their behalf. In these circumstances I think upon the counterclaim of the defendants they are entitled to an inquiry as to the damages sustained by them in consequence of that breach of the warranty of authority, and I direct that inquiry to be held by a Taxing Master, it being essentially a question of costs, and I shall direct that the Master in assessing the damages shall do so on the principle that the defendants are entitled to be put into the same position as they would have been if the plaintiff Talbot in fact had had the authority which he represented he had.

At the end of the judgment counsel for the defendants applied for leave to appeal on the question of costs, and Avory J. gave leave to appeal.

The defendants, by their notice of appeal, appealed against the verdict and judgment for 100*l.* and costs in favour of the British Russian Gazette and Trade Outlook, Ld., on the ground that the words complained of in the statement of claim were not reasonably capable of a meaning defamatory of the plaintiff company.

The plaintiff Talbot appealed against the judgment in favour of the defendants on their counterclaim against him for breach of warranty of authority upon the ground that there was no evidence that he warranted or represented that he had authority to settle both actions, and further that the transaction pleaded in the counterclaim was no more than an executory accord giving no rights, and further that the document of October 10, 1932, by itself could not effect a settlement of both actions.

Sir William Jowitt K.C. and *Valentine Holmes* for the defendants stated the facts and submitted that there was no case to go to the jury as regards the claim by the company for libel, the words relied upon not being capable of a defamatory meaning. As to the counterclaim, they submitted that the plaintiff Talbot was clearly liable in damages for breach of warranty of authority.

Sullivan K.C. and *Robert Fortune* for the plaintiffs. The alleged breach of warranty of authority arises out of an agreement which in law is nugatory, and therefore the decision in *Collen* v. *Wright* (1) has no relevancy. It has long been settled law that an accord without satisfaction, which is the position here, is a thing of naught. As is said in Leake on Contracts, 8th ed., p. 680: "An accord alone is in the nature of an offer which the parties may respectively refuse or withdraw until the consideration to be performed or given and accepted in satisfaction is completely executed." That statement is supported by a long line of authorities, such as *Allen* v. *Harris* (2); *Lynn* v. *Bruce* (3); *Reeves* v. *Hearne* (4); *Morris* v. *Baron & Co.* (5) In this case there was no promise to pay the 1000 guineas; it was merely "I accept." There was thus no contract.

(1) 8 El. & Bl. 647.
(2) (1696) 1 Ld. Raym. 122.
(3) (1794) 2 H. Bl. 317.
(4) (1836) 1 M. & W. 323.
(5) [1918] A. C. 1, 35.

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[Greer L.J. A person may warrant that there is a contract. In *Firbank's Executors* v. *Humphreys* (1) the directors of a company were held liable on the principle of *Collen* v. *Wright* (2), although the company could not have made the contract alleged.]

The documents in this case, said to be a settlement, did not constitute a completed transaction; something still remained to be done.

Sir William Jowitt K.C. in reply. With regard to costs. Sect. 31, sub-s. 1 (*h*), of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that: "No appeal shall lie . . . . without the leave of the Court or judge making the order, from an order of the High Court or any judge thereof made . . . . as to costs only which by law are left to the discretion of the Court." Order 65, r. 1, of the R. S. C. provides that: "Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or judge." It is stated in the Yearly Practice for 1933, p. 1365, that "even if the trial judge has given leave to appeal as to costs within his discretion, it is not the duty of the Court of Appeal to rehear the case, and that Court will not interfere with his discretion unless he has proceeded in his judgment on some erroneous principle of law, and has not in fact exercised his discretion on the facts of the case. The Court of Appeal has no right to substitute its discretion for the discretion of the judge in the Court below." In the present case Avory J. thought that the plaintiffs had been guilty of blameworthy conduct but not sufficient to entitle him to deprive them of costs, but he was so doubtful as to this that he invited the defendants to appeal against his decision as to costs; he wished the Court of Appeal to say whether he was justified in not depriving the plaintiffs of costs. In those circumstances the Court of Appeal have power to make the order Avory J. could and ought to have made. In *Donald Campbell & Co.* v. *Pollak* (3) Branson J. on the trial of the

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(1) 18 Q. B. D. 54. (2) 8 El. & Bl. 647. (3) [1927] A. C. 732, 734.

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action gave judgment for Pollak but without costs, mainly on account of his misconduct in another case. Pollak appealed to the Court of Appeal on the question of costs, but without leave. That distinguishes that case from the present one.

With regard to the appeal of the plaintiff Talbot against the judgment against him for breach of warranty of authority to make a settlement of the action, it has been contended that there was accord without satisfaction, and that accord without satisfaction is useless and without legal consequences. If however there is an agreement made for good consideration for the release of a party from an obligation arising under contract or tort, such agreement even without satisfaction is sufficient to support a cause of action. Further the agreement itself may be both accord and satisfaction. Looking at the agreement that was entered into in the present case by the defendants and Talbot in the light of the surrounding circumstances, it is plain that the parties accepted the agreement as being a satisfaction. The origin of the rule as to accord and satisfaction goes back a very long way. Until the decision in *Slade's Case* (1) the Courts did not recognize mutual promises as forming a sufficient consideration for each other. After that case "debt as a remedy upon simple contracts practically disappeared, its place being taken by indebitatus assumpsit." See Holdsworth's History of English Law, 3rd ed., vol. iii., pp. 443–448; vol. viii., pp. 81–85. It was resolved in that case "that every contract executory imports in itself an assumpsit . . . . for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt." The early cases of accord and satisfaction turned largely on the absence of consideration. An agreement consisting of mutual promises to be performed on both sides in the future is a good agreement. In *Lynn* v. *Bruce* (2) the declaration alleged that in consideration that the plaintiff, at the defendant's request, had consented and agreed to accept and receive from the defendant a composition of so much in the pound in full satisfaction and discharge of the debt, the defendant promised to pay the composition. It was averred that the composition amounted to 73*l.* and that the defendant had paid 70*l.* It was held there was no consideration to support the action and that it was a mere accord without satisfaction. In *Good* v. *Cheesman* (1) there was an agreement among the creditors of a debtor to accept a composition from the debtor, and it was held that the agreement though not properly an accord and satisfaction was still a good defence to an action by one of the creditors for his debt, as it was a valid new contract between the creditors and the debtor, capable of being immediately enforced, the consideration for which to each creditor being the forbearance of the rest. In *Cartwright* v. *Cooke* (2) an agreement was executed between three brothers for the settlement of their affairs and the determination of their mutual claims, and an apportionment of property and of debts was made among the three, and an annuity bond, of which B. was surety, was declared to be B.'s debt. B.'s administrator having been obliged to pay arrears of the annuity was held not entitled to recover them from A., the original principal on the annuity bond. Per Curiam (3): "This was a good accord as between the parties to the instrument, and binds the plaintiff. The promise of one was a consideration for that of another. Each had an immediate remedy upon it against the other; and in this respect it falls within the rule in *Com. Dig. Accord.* B. 4, that 'an accord, with mutual promises to perform, is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance.'" An accord was merely an agreement without consideration, as soon as there was consideration it became a good accord. It was held in *Ford* v. *Beech* (4) that a promise not to sue for a limited time for a simple contract debt could not be pleaded in bar to an action for such debt, but would give rise to a cross action by the defendant for damages sustained by him by reason of the

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(1) (1602) 4 Co. Rep. 92*b*; 94*a*.

(2) 2 H. Bl. 317.

(1) (1831) 2 B. & Ad. 328.
(2) (1832) 3 B. & Ad. 701.
(3) 3 B. & Ad. 703.
(4) (1846) 11 Q. B. 852.

plaintiff suing in breach of his agreement. In *Thimbleby* v. *Barron* (1), which was an authority to the same effect, Lord Abinger C.B. in the course of the argument said (2): "The breach of the agreement to forbear suing renders the party liable in damages, but it is not pleadable in bar." *Flockton* v. *Hall* (3) shows that an agreement itself may be both accord and satisfaction, but in that event it must be alleged and proved that the agreement was accepted in satisfaction.

[SCRUTTON L.J. The question of accord and satisfaction is dealt with in Salmond and Winfield on the Law of Contract at pp. 328–334, and the authors come to the conclusion that modern law recognizes the binding operation of an executory accord and satisfaction although formerly it was considered necessary that an accord and satisfaction should be executed.]

In *Crowther* v. *Farrer* (4) an action was brought on an agreement that two actions pending in the Queen's Bench at the suit of the plaintiffs against the defendant should be settled and all proceedings therein stayed, and that the defendant should pay the plaintiffs money. The breach alleged was the non-payment of the money. It was argued that the agreement was a mere accord and that there was no averment of performance. The Court held that the declaration disclosed not a mere executory accord but an agreement with sufficient consideration to support the defendant's promise, and that the action lay. In *Henderson* v. *Stobart* (5), while an action was pending by a banking company against T. on a bill of exchange, it was agreed between the company, T., and the defendant that the action should be settled upon certain terms, including the giving by the defendant of a promissory note for 500*l*. The breach alleged was the failure of the defendant to give the company the promissory note for 500*l*. It was held that, a new person having been made a party to the contract, the agreement set out in the declaration was a binding agreement and not a mere accord, and that it would have been broken

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(1) (1838) 3 M. & W. 210.
(2) Ibid. 216.
(3) (1849) 14 Q. B. 380.
(4) (1850) 15 Q. B. 677.
(5) (1850) 5 Ex. 99.

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if the company had proceeded with the original action. In *Ruck* v. *Brownrigg* (1) it was held that an action might be maintained to enforce the terms of an unexecuted accord where the original cause of action being unliquidated there is the slightest additional consideration imported into the agreement for compromise. Lord Atkinson said in *Morris* v. *Baron* (2): "If . . . . it can be shewn that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made." If this agreement does not amount to a good defence at law, it is nevertheless sufficient to support a cross action. The document initialled on October 10 as the terms of settlement was an agreement to settle the action in consideration of a promise to pay 1000 guineas. That promise was accepted in satisfaction of the agreement. Further a third person, Miss Parker, was brought into the agreement, and the term of settlement incorporated the letter to be written by Mr. Henderson. That would itself amount to a consideration. The defendants' counterclaim against the plaintiff Talbot is for breach of warranty of authority, and the topic of accord and satisfaction is not germane to that claim. The defendants are entitled to be put in the same position as they would have been in if the plaintiff Talbot had the authority which he represented that he had. If he had had that authority the defendants would have had to pay their own costs up to October 10, 1932, and 1000 guineas, and the damages which the defendants are entitled to recover from the plaintiff Talbot for breach of warranty of authority are the difference between that sum and the costs which have actually been incurred by them.

Sullivan K.C. replied on the cases.

Cur. adv. vult.

July 28. The following judgments were read :—

SCRUTTON L.J. This appeal in an action for libel raises a variety of difficult and apparently unconnected points.

(1) (1850) 2 Ir. Jur. 142.

(2) [1918] A. C. 35.

Mr. Talbot, a British citizen, was before, during and after the Great War engaged in commerce in and with Russia. In the Russian Revolution a large sum of money invested by Mr. Talbot in Russian securities was confiscated by the Revolutionary Government. He, in company with other British subjects in the same unfortunate position, formed in 1922 an Association to endeavour to recover the money they had lost. A Miss Parker was secretary of the Association. Mr. Talbot also started a newspaper entirely his own property, of which Miss Parker was editor, to further the same objects. At first the Association and the newspaper proceeded by vigorously attacking the Soviet Government. In 1924, or 1925, Mr. Talbot changed his views as to the best method of obtaining redress, and came to the conclusion that he was more likely to be successful by promoting trade between England and Soviet Russia, and getting on friendly terms with the Soviet Government. It is not suggested that either of Mr. Talbot's views was other than an honest attempt to obtain redress from Russia. After 1925 Mr. Talbot followed his new attitude and became on friendly terms with the Soviet representatives; he thereby obtained certain privileges from them in Moscow, beginning in 1928. The Soviet Government took a considerable number of copies of Mr. Talbot's paper for circulation in Russia to Government offices. Up to the end of 1929 Mr. Talbot was the proprietor of the paper and identified with its policy, and Miss Parker was editor at a salary. In February, 1930, a small private company was formed, the British Russian Gazette and Trade Outlook, Ld. Mr. Talbot transferred all his rights in the paper to the company for fully paid shares, all the company's capital. Its capital was 500 1*l.* shares on which no money was paid. Of these shares Mr. Talbot presented 250 shares to Miss Parker, who remained editor, and at a later date, before the events next to be mentioned, he transferred 225 shares more as a present, leaving himself the owner of 25 shares, and with an agreement by which he received certain profits, or commission, from the business. The paper described itself as published by the company, Talbot and Miss Parker directors. They were the only two shareholders. There was no formal appointment of the lady as "Managing Director," but she did manage the business. There was no change of policy or management following the incorporation of the company. It has never paid a dividend. The paper and Mr. Talbot have been completely identified from 1922 to 1930 and there has been no severance of the identification.

Under these circumstances on June 30 and July 1, 1931, the Daily Mail, owned by Associated Newspapers, Ld., published some matter which Mr. Talbot and the company complained of. Mr. Talbot issued a writ for libel; the company for a cause of action described in the letter before action and the writ as "slander of title," that is defamatory matter respecting the goods sold by the company, the paper. The action was tried before a jury and resulted in judgment for Mr. Talbot for 1000*l.* and costs, subject to a judgment against him on a counterclaim; and judgment for the company for 100*l.* and costs. The defendants do not appeal against the judgment for damages against Mr. Talbot, but do appeal against the order as to costs; the defendants also appeal against the judgment in favour of the company, on the ground that the words complained of are not capable of bearing a meaning defamatory of the company, and that, no special damage being alleged, there can be no claim for slander of title.

The plaintiff Talbot appeals against the judgment against him on the counterclaim to be dealt with hereafter for breach of warranty of authority.

I deal, first, with the defendants' appeal against the company. At the close of the plaintiffs' case counsel for the defendants submitted that the words complained of were not capable of a defamatory meaning in relation to the company. The learned judge said: "I am not prepared to say that the words are not capable of some defamatory meaning on the company, although I have grave doubt about it." I have carefully considered the words complained of and the evidence adduced by the plaintiff and am of opinion that the words complained of are not reasonably capable of a meaning defamatory to the company. The origin of the article complained of was that a Russian named Bukharin, whom the Daily Mail strongly objected to, but who had nothing to do with either Mr. Talbot or the company, was allowed to be in London, and the writer of the article was under the delusion that the Privy Council had something to do with his presence: "Why should the Privy Council go out of its way to help Moscow?" and further at a time when Mr. Churchill was speaking of Moscow's menace to Europe's peace, the British Broadcasting Corporation allowed Mr. Talbot to broadcast an address in glowing terms about Soviet Russia's industrial plans. This was described in a headline as "Putting it Across the B. B. C.," whatever that may mean. There was nothing in the issue of June 30 about the company or its paper.

On July 1 the Daily Mail returned to the attack. It again objected strongly to Bukharin's presence in England; it again protested, without mentioning Mr. Talbot's name, against the allowance by the B. B. C. of a Soviet propagandist lecture. It then proceeded, in a passage on which the judge left to the jury questions whether certain parts of it were true or untrue facts or comment as follows. There were two headlines: "Friend of Soviet. Moscow's Favours for Mr. Talbot." On those the learned judge left the question 2 (*e*): "Was the plaintiff a friend of the Soviet and receiving favours from Moscow?" The jury answered: "True—fact." The alleged libel continued: "Mr. Talbot is the proprietor of the 'British Russian Gazette and Trade Outlook,' a monthly journal devoted to the development of Soviet trade." The judge left question 2 (*f*) to the jury: "Was the plaintiff, Talbot, the proprietor of a journal devoted to the development of Soviet trade?" The jury answered: "True—fact." It was, of course, not true that Mr. Talbot was in 1931 the proprietor of the journal, but the fact that the writer said that he was appears to me clearly to show that the writer knew nothing about the company, and was not saying anything about it. The alleged libel continued: "He organised the Association of British Creditors of Russia, for which he was Vice-Chairman until the General Election, 1924, when he made an arrangement with the Soviet." The judge asked question 2 (*g*): "Did he make an arrangement with the Soviet Government after the General Election of 1924?" and the jury answered: "True—fact." The alleged libel proceeded: "He has since visited Russia many times under Soviet auspices and has been the recipient of much praise for his work on behalf of Soviet interests in this country." The jury were asked question 2 (*h*): "Has he visited Russia under Soviet auspices, and been the recipient of praise for his work on behalf of Soviet interests in this country?" and the jury answered: "Untrue—fact," meaning that it was alleged to be a fact, and was not true. Lastly, the alleged libel continued: "As a sign of appreciation the Soviet has given Mr. Talbot permission to open an office at Moscow for his journal, through which it is proposed to disseminate information on Russia to British interests." On that the judge asked question 2 (*i*): "Did the Soviet Government give permission to Talbot to open an office in Moscow as a sign of their appreciation?" and the jury answered: "True—fact." It will be seen that in the statements complained of there is no mention of the company or the paper, and the ordinary person reading it in the absence of special knowledge could not derive from it an unfavourable impression of the company or the paper whose existence was not mentioned. Perceiving this the ingenuity of plaintiffs' counsel produced an "innuendo." This says that the words complained of mean, and were understood by those who read them to mean, that the company and the paper were under the control of the Soviet Government, and that the company and the paper were a mere cloak for disloyal activities of Talbot, and existed for no other purpose. Considering that Talbot had been the known proprietor of the paper from 1922 to 1929, when there was no company in existence, and that when the company was formed Talbot's name appeared, and continued to appear, on the front page as a director, the suggestion about a "cloak" for Talbot appears ludicrous. As far as the company was concerned, I can see no reasonable ground for suggesting the innuendo.

The plaintiff called some evidence from three commercial men, who had known and had commercial dealings with Talbot for years before there was a company. None of the three said they had read the libel and understood it to refer to the company; none of them said a word about the company or showed any knowledge of its existence. Their evidence was confined to Talbot's patriotic character, and to the statement that a paper supposed to favour the Soviet would be injured by losing British advertisements, evidence to support a claim for slander of title. The libel did not mention the company or the paper, and there was no evidence as alleged in the pleaded innuendo that persons who read the libel would understand it as defamatory of the company. Such evidence was given in *Cassidy* v. *Daily Mirror Newspapers* (1), and enabled this Court to establish a libel against a person who had no knowledge of the existence of the person defamed. Lord Selborne said in *Capital & Counties Bank* v. *Henty* (2): "In deciding on the question whether the words are capable of that meaning" [meaning the innuendo] "he [the judge] ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form, as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest, as implied in the publication, those particular motives or reasons." In my opinion, the libel not mentioning the company or its paper, and no evidence being called of any one who, reading the libel, believed it to refer to the company and its paper, or of any damage actually suffered by the company or the circulation of its paper after the publication of the libel, the judge should have given effect to his "grave doubt" and withdrawn the case from the jury. The result

(1) [1929] 2 K. B. 331.

(2) (1882) 7 App. Cas. 741, 744.

of this is that the judgment in favour of the company for 100*l.* and costs must be set aside and judgment entered for the defendants against the company with costs here and below.

The second point in the defendants' appeal is quite a different one. At the trial they invited the judge to deprive both plaintiffs of all or some of their costs by reason of their conduct in respect of the matter the subject of the plaintiffs' appeal, the breakdown of the alleged settlement and the proceedings subsequent thereto. The learned judge said in his judgment : " I will first deal with the question of whether there is, in this case, sufficient ground for my departing from the ordinary rule that the successful party should be entitled to the costs. Although I have a very strong opinion that both the plaintiff Talbot and the plaintiff company, through their solicitors, have been guilty of conduct which is blameworthy, I am not satisfied that that conduct has increased the costs of this litigation. Therefore, I am not prepared to make any special order to deprive either the plaintiff Talbot or the plaintiff company of their costs. Accordingly, I give judgment for the plaintiff Talbot for 1000*l.* with costs, and for the plaintiff company for 100*l.* with costs. I have so much doubt whether there are any grounds in this case which would justify me in depriving both these plaintiffs, either of their costs or of part of them, that if the defendants ask for it I would give them leave to appeal on the question of costs." The defendants accordingly appeal. Under the present Order LXV., r. 1, the judge has an unappealable discretion as to costs, and the decision of the House of Lords in *Donald Campbell & Co.* v. *Pollak* (1) has emphasized that this cannot be interfered with unless exercised for reasons wholly unconnected with the cause of action, as that the plaintiff has red hair, or, I think that the defendant is deprived of his costs because he successfully pleads a good legal defence such as the Gaming Act. All the matters which the judge considered are closely connected with the cause of action and the proceedings in the action,

(1) [1927] A. C. 732.

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and I do not regard leave to appeal as intended to substitute the discretion of the Court of Appeal for the statutory discretion which the judge has, in fact, exercised. As to the company, in view of my previous decision, the question is only academical ; as to Talbot, I see no ground for interfering with the discretion the judge has exercised for reasons within his competence. Talbot must have the costs of this appeal, though as to the costs in the action the proceedings in the counterclaim may affect the amount.

The next question is the plaintiff Talbot's appeal as to a judgment against him for breach of warranty of authority to make a settlement of the action and damages for such breach based on *Collen* v. *Wright.* (1) It arises in this way. While the action was in progress Mr. Talbot, who I think had never realized that since the formation of the company and his gift of shares to Miss Parker he was no longer the master of the situation that he had been from 1922 to February, 1930, was brought into touch by a mutual friend with the head of the Daily Mail Legal Department. First, there was a dinner at which a settlement was discussed on the lines of a substantial money payment by the Daily Mail to cover damages and costs, the withdrawal of all legal proceedings, and the giving by the Daily Mail of a letter, not for publication but for private circulation, stating that they had no intention to impute disloyalty to Mr. Talbot. There was then an interval of two or three days during which Mr. Talbot had ample opportunity to consult his solicitors or his co-director, Miss Parker. He appears not to have consulted either, but to have gone to a lunch at which Mr. Henderson, for the Daily Mail, produced a draft proposal for settlement and a draft letter. Each document was considered, altered by agreement, with each alteration initialled, and then the whole document was initialled as agreed by each side, or as Mr. Talbot said, O.K.'d, the Court being informed by evidence that O. K. means " Orl Korrect."

In my view the document beginning " I accept " is clearly an agreement by which, in consideration of an agreement

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(1) 8 El. & Bl. 647.

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by the Daily Mail to pay 1000 guineas, and to write the letter there initialled and agreed upon, Mr. Talbot agrees on behalf of himself and the plaintiff company, and the officers of the company, to accept that sum in full discharge of all their claims in respect of the Daily Mail articles, and to take steps to end the proceedings now pending, neither side to publish this amicable statement of this dispute in their papers. In my opinion it is an agreement in which the consideration on each side is an agreement by the other side: "In consideration of your agreement I will agree." It is also clear that Mr. Talbot had not the authority of his company, or of his co-director and co-shareholder, Miss Parker, to make this agreement. Under the doctrine of *Collen* v. *Wright* (1), as extended beyond making contracts to doing acts having a legal effect by *Starkey* v. *Bank of England* (2) and *Firbank's Executors* v. *Humphreys* (3), Mr. Talbot warranted he had the authority he professed to have, and, as he had not that authority, had broken his warranty and was liable in damages. The plaintiffs alleged that this initialled document was not a concluded agreement, but had been expressly agreed to be only provisional, and subject to the approval of Miss Parker and the company. The jury were accordingly asked Question 4: "Did Talbot, on October 10, 1932, say that he was making the agreement provisionally, subject to the approval of Miss Parker, and that he could not bind her or the plaintiff company?"—and the jury answered: "No." Miss Parker unfortunately took such a mistaken view of the most beneficial course to take as to object to the settlement for 1000 guineas unless there was an apology to be published. There is such a thing as dropping the substance in trying to get the shadow as well. Some one, said to be a solicitor's clerk, increased the difficulty by demanding costs as well as an apology, and the plaintiffs' advisers, in the letter of October 11, took the view that Mr. Talbot had settled his action for 1000 guineas, but that the company's action could go on for further damages and costs. There ensued lengthy proceedings on an application to stay the action as settled, which were ultimately referred to the judge at the trial, a lengthy trial, and now a lengthy appeal. This might all have been avoided if Miss Parker, who from her company proceedings does not seem to be a very businesslike woman, had used a little common sense. The payment of 1000 guineas by the Daily Mail was a sufficient vindication of the company, Mr. Talbot, and herself, without insisting on a published apology, and the exercise of a little common sense would have shown her that, provided she made a satisfactory agreement with Talbot as to the share of the money to go to her and to the company, it was silly to refuse to take the money unless there was added a public apology. However, she was silly, and refused to agree to the settlement. The result has been a flood of authorities and argument on the subject of accord and satisfaction, a subject one would not expect to make its appearance in an action for libel.

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(1) 8 El. & Bl. 647, 657.

(2) [1903] A. C. 114.

(3) 18 Q. B. D. 54.

Serjeant Sullivan, with great earnestness, almost vehemence, insisted that it was elementary that accord without satisfaction was useless; if there was no satisfaction, that is to say performance of the accord, the accord by itself was perfectly useless and devoid of legal consequences. Of course, the point of the counterclaim was that there had been no satisfaction because Mr. Talbot had broken his warranty of authority to promise satisfaction, and there would have been satisfaction if his warranty had been complied with.

Some difficulty in the authorities results from the fact that the early view of the law was that consideration for an accord must be executed, but at a later period the Courts took the view that it was sufficient if the consideration was executory. The matter is fully discussed in Professor Holdsworth's work, and the work of the late Sir John Salmond and Professor Winfield, which, in my opinion, accurately states the position. Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative. Formerly it was necessary that the consideration should be executed: "I release you from your obligation in consideration of 50*l.* now paid by you to me." Later it was conceded that the consideration might be executory: "I release you from your obligation in consideration of your promise to pay me 50*l.*, and give me a letter of withdrawal." The consideration on each side might be an executory promise, the two mutual promises making an agreement enforceable in law, a contract. Comyns puts it in his Digest, and the passage was approved by Parke B. in *Good* v. *Cheesman* (1) and by the Court of King's Bench in *Cartwright* v. *Cooke* (2): "An accord, with mutual promises to perform, is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance," that is to say, a cross action on the contract of accord. Lord Atkinson's statement in *Morris* v. *Baron* (3), a case on the Statute of Frauds, having a very remote connection with accord and satisfaction, is to the same effect. "If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made." This was anticipated in 1602 in *Goring* v. *Goring* (4), where an agreement to discharge a debt of 205*l.* by a promise of payment in instalments of 150*l.*, though not satisfaction, was held to be a valid agreement, promise against promise. There are numerous cases where promise against promise is held, if not satisfaction, to be a valid subject for a cross action: *Ford* v. *Beech* (5), Parke B. giving the judgment of Exchequer Chamber; *Crowther* v. *Farrer* (6); and *Henderson* v. *Stobart*. (7) There are also cases where if the consideration

(1) 2 B. & Ad. 328, 335.
(2) 3 B. & Ad. 701, 703.
(3) [1918] A. C. 35.
(4) (1602) Yelv. 11.
(5) 11 Q. B. 852.
(6) 15 Q. B. 677.
(7) 5 Ex. 99.

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includes a promise by a third party not previously concerned in the obligation, there is an enforceable contract: *Good* v. *Cheesman* (1); *Cartwright* v. *Cooke.* (2) The document is to be construed in accordance with the intention of the parties as expressed in it, and if there is doubt, as Parke B. says in one of the cases cited, the construction which makes it effective to carry out that intention prevails. The argument for the plaintiffs on accord and satisfaction was directed to show that if Talbot had authority, the document would have had no legal result. In my view there was an agreement to accept promise against promise, and a third party, Miss Parker, was included in the promise. The result in law was an enforceable agreement at any rate as in the present case by way of counterclaim.

The remaining question is the measure and mode of ascertaining the damages. The judge dealt with the matter in this way. He said in his judgment: "I think upon the counterclaim of the defendants they are entitled to an inquiry as to the damages sustained by them in consequence of that breach of the warranty of authority, and I direct that inquiry to be held by a Taxing Master, it being essentially a question of costs, and I shall direct that the Master in assessing the damages shall do so on the principle that the defendants are entitled to be put into the same position as they would have been if the plaintiff, Talbot, in fact had had the authority which he represented he had," and he directed that counsel should submit minutes to him. Unfortunately he was ill and counsel did not submit minutes to him, but agreed a passage which does not appear in the judge's delivered judgment but is said to be founded on some interlocutory remarks in argument which we have not seen. It is: "namely, in the position in which they would be in if the parties had carried out the terms of the document of the 10th October, 1932, and the actions had not been continued thereafter with costs of the counterclaim including the costs of the inquiry as to damages." It is quite irregular that the latter passage should have been included in the judgment entered, whether it is right or wrong. The judge did not say so in the judgment he delivered, and it must be struck out of the judgment as entered. The language used by the judge in his judgment is based upon that used by Lord Esher in *Firbank's Executors* v. *Humphreys* (1) and in *Panmure's Case*. (2) What have the defendants lost, because owing to the plaintiff Talbot having broken his warranty of authority to make a particular contract the defendants have lost the benefit they would have derived from that contract ? If the agreement was never enforceable, the defendants have lost nothing. I have held it was an enforceable agreement if Talbot had authority to make it. If so, what have the defendants lost ? If the contract was made with authority, the defendants would have discharged all liability for damages and costs to Talbot, the company, or Miss Parker as an officer of the company by payment of 1000 guineas and by writing a letter. There being no authority they have been put to the further expense of costs incurred by and payable to Talbot after the agreement and their own similar costs, less 50*l*. based on the verdict of the jury for 1000*l*. instead of guineas ; they have had to pay their own costs in the company's action after the agreement, they have been landed in an expensive inquiry as to the authority before Sir George Bonner, a considerable portion of which may be due to an allegation that one director can bind a company which ought not to have been made. On this point a difficult question may arise as to the reasonableness of defendants' conduct in fighting Talbot's action after the defendants knew that the company repudiated authority. On the one hand the defendants were wrong in contending that one director could bind the company ; on the other hand they did not know the internal government or shareholding of the plaintiff company, and if they paid money into Court and withdrew other defences, it would be taken out and their counterclaim against Talbot, if successful, could not be regarded as certain to be satisfied by payment. I think on the whole it was not unreasonable for them to go

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(1) 2 B. & Ad. 328.
(2) 3 B. & Ad. 701.

(1) 18 Q. B. D. 54, 60.

(2) (1883) 24 Ch. D. 367, 372.

to trial on the pleadings as they stood. So far as their expenses were not reasonably incurred they would not be entitled to recover them. It was said: (1.) You could have settled with Talbot for 1000 guineas and ought to have paid it. But that sum was to settle two actions, not Talbot's action, and I see nothing unreasonable in declining to increase the sum payable in the agreement for Talbot's action by striking out the company's action from the settlement. It was also said: (2.) You might have avoided the company's action by apologizing and paying costs, the latter stipulation never being withdrawn. I see nothing unreasonable in the refusal to publicly apologize and pay costs. If these directions are right, the question is one of taxation and an apportionment of costs, and an appropriate one for the Taxing Master with the directions contained in the judge's judgment, as expanded by the views expressed by this Court.

The plaintiff Talbot's appeal must, therefore, be dismissed with costs. I have already dealt with the defendants, appeal.

Greer L.J. I agree with the judgment which has just been read by Scrutton L.J. on all the questions of principle with which he deals, except that I would state rather differently the directions to be given to the Taxing Master relating to the damages to be awarded for breach of the contract alleged by the defendants in their counterclaim.

The plaintiff company by their statement of claim allege that they were at all material times the proprietors of a monthly paper entitled The British Russian Gazette and Trade Outlook, having offices at Walton House, Bedford Street, W.C. 2, in the County of London. This statement was put in issue in para. 7 of the defence in the consolidated action. It was never proved by any witness at the trial, but as it was probably not disputed I am prepared to deal with this case on the assumption that it was admitted at the trial; but this seems to me to be immaterial, because the alleged libel does not mention the company from beginning to end, and no witness was called to say that he read the newspaper and he knew that the plaintiff company was the proprietor of the newspaper, and from that fact on reading the two articles in the Daily Mail they meant to him that an attack was being made on the character of the company as being a company which according to the innuendo allowed itself to be used as a mere cloak for the activities of the other plaintiff, Mr. Stafford Cecil Talbot. In the natural and ordinary meaning of the words no reflection whatever is made on the company, and in order to succeed it was necessary that there should be an innuendo that the words meant something derogatory to the character of the company and were so understood by some person to whom the alleged libel was published. If, for example, a newspaper stated that "the man who lives at No. 22 X Street is a fraudulent company promoter," this would not of itself constitute a libel unless the recipient of the statement was able to say: "I knew that the plaintiff was a person who resided at 22 X Street, and therefore, as read by me, the libel meant that that person was a fraudulent company promoter." This may seem to be a very technical way of looking at the case, but it is a technicality which the defendants are entitled to take advantage of, because there is really no substance in the contention that any reasonable reader would regard the statements in the Daily Mail as an attack on the company as distinguished from its director and founder, Mr. S. C. Talbot.

For these reasons I think the learned judge was wrong in not going beyond the doubt that he expressed whether there was any case made by the plaintiff company for the defendants to meet, and in refusing to hold that there was no such case. I think there was no evidence given at the trial which justified the case of the plaintiff company being left with the jury. I think the defendants' appeal so far as it is concerned with the verdict and judgment in favour of the plaintiff company succeeds. With regard to their appeal on the question of costs dealt with by the learned judge, I agree with the views of Scrutton L.J., and I may add, if it were a matter for the discretion of this Court, I would be prepared to exercise it in the same way as the learned judge did, by saying that there is no sufficient reason why the plaintiff Talbot should be deprived of his costs incurred after the solicitors' letter of October 11, 1932.

With regard to the cross-appeal of the plaintiff S. C. Talbot against the judgment of the learned judge given on the counterclaim, I agree with Scrutton L.J. that the defendants have established a case against him for damages for breach of warranty of authority. Assuming that the vigorous argument presented to the Court by Serjeant Sullivan on behalf of the plaintiff Talbot is right, though, as will be seen presently, I think it is wrong, I should still think that the defendants would be entitled to succeed on their claim for damages for breach of warranty of authority. It is not, and cannot be, disputed that an accord followed by satisfaction would have extinguished the causes of action of both plaintiffs if Talbot had had authority from the plaintiff company and its officers to conclude the agreement made in October between Mr. Henderson on behalf of the defendant company, and purporting to be made by Mr. Talbot on behalf of himself, the plaintiff company, and the officers of the plaintiff company, to pay the 1000 guineas mentioned in the second of the two documents recording the agreement. I think Talbot warranted that he had authority to make an accord and satisfaction, and if it be the law that accord without satisfaction creates no legal obligations, I think it would still be right to say that Talbot warranted that he had authority to make an accord and satisfaction, and is liable for a breach of that warranty. It is clear that even in cases where the contract which the agent warranted he had authority to make would not, if authorized, create any legal obligation by his principals, the agent is none the less liable for damages for breach of warranty of authority: see *Starkey* v. *Bank of England* (1) and *Firbank's Executors* v. *Humphreys*. (2) It seems to me reasonably certain that if Mr. Talbot had had the authority he purported to exercise, not only would the agreement to settle have been made, but the 1000 guineas would also have been paid. However, as the question of the effect of an accord without satisfaction has been fully argued, I think I ought to state my views upon it.

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(1) [1903] A. C. 114.

(2) 18 Q. B. D. 54.

In my judgment, at the present day, the law of this country is that where two people make mutual promises, the promise of each being the consideration for the promise of the other, this amounts to a contract in law for the non-performance of which an action for damages will lie. I think, however, that it is too late to say that the old rule that an accord without satisfaction does not discharge a liability after breach can be disturbed by a judgment of this Court. I think it is still the law that a mere accord without satisfaction does not put an end to an existing liability after breach, but I think it amounts to an agreement which can be enforced by a claim for damages if it is broken by one of the parties when the other has shown his readiness to perform the terms of the agreement. It seems probable that the rule that an accord without satisfaction afforded no defence in an action for damages after breach arose from the fact that in the early days of the development of the common law the binding character of executory agreements was not recognized: see the history of this matter in Holdsworth's History of English Law, vol. 8, at pp. 81, 84; see also Salmond and Winfield on Contracts, 1927 edition, at p. 330. Many cases were cited by Serjeant Sullivan in support of his proposition that an accord without satisfaction had no effect in law. He began with *Allen* v. *Harris*. (1) In that case the defendant pleaded that the plaintiff in consideration that the defendant, at the special instance of the plaintiff, assumed to pay to the plaintiff 20s., agreed to discharge the defendant of his liability in trover. There was no allegation that the 20*s*. had been paid. It was held that even though the party who brought the action did not perform his part, he might still maintain his action in trover. This decision has no bearing whatever on the question

(1) Ld. Raym. 122.

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whether the contract was a contract which the law would recognize, and in the argument for the defendant Serjeant Girdler says (1): "It being now settled that the parties may have actions upon mutual promises, this accord may be pleaded, though not executed." His argument was not accepted, but there is nothing to show that the Court disapproved or disputed the proposition that the parties might have action upon the mutual promises which made the accord. In the course of the argument the case of *Case* v. *Barber* (2) was cited. In that case the Court appears to have accepted the proposition as applicable to the question under consideration that it had been lately held that on mutual promises an action lies, but they refused to give effect to a plea of accord and satisfaction by an agreement with a third party, because they said there was no consideration and because of the plea of the Statute of Frauds. The next case relied on was *Lynn* v. *Bruce*. (3) It is clear that the case was one of accord with only part satisfaction. It was a decision as to the validity of a count in a declaration based on an agreement to accept a composition, no other creditor having been alleged to be party to the agreement; it was held that a breach of the agreement did not give the plaintiff a cause of action. In giving judgment Lord Chief Justice Eyre based the decision on a ground, which, if correct, would make an accord without satisfaction an agreement contrary to public policy and void, but the observations of the learned Chief Justice were not necessary for the purposes of the decision. It was enough to make the count under consideration bad that it was based on a promise to discharge a larger sum by payment of a smaller sum. The decision of the Court was undoubtedly right, but I do not think the reasons for the decision stated by the learned Chief Justice can now be supported. *Reeves* v. *Hearne* (4) also was not a direct decision on the question whether the accord created an enforceable agreement, but only on the question whether it afforded a defence to an action on the original debt, and it appears from the report that both the original debt and the debt, if any, created by the new agreement were extinguished by the Statute of Limitations: see per Lord Abinger C.B. (1); and in any case Parke B. points out that the new agreement was only a satisfaction pro tanto, and the original debt remained for the residue, and, not being extinguished, was barred by the statute. *Bayley* v. *Homan* (2) was a case in which an accord without satisfaction was held to be bad. I am inclined to think that the facts pleaded in that case would, at the present day, have induced the Court to say that the agreement itself was the accord and satisfaction. The case is only an authority for the proposition that a plea in the form in which it was relied upon in that case was a plea of an accord without satisfaction. *Gabriel* v. *Dresser* (3) was another case where a plea relying on a new agreement with regard to an obligation to load timber at Dantzic was held to be bad as it only amounted to an allegation of accord without satisfaction. *Elton Cop Dyeing Co., Ld.* v. *Broadbent & Son, Ld.* (4), does not assist Serjeant Sullivan's argument so far as the decision is concerned. It was there decided that the parties had agreed to accept a new agreement in satisfaction, and the Court held that whether performed or not the old liability was discharged. Serjeant Sullivan also relied on the observations of Lord Atkinson in *Morris* v. *Baron & Co.* (5), where his Lordship uses these words: "There is no doubt that the general principle is that an accord without satisfaction has no legal effect, and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory. That was decided so long ago as 1611 in *Peytoe's Case.* (6) If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made." There is no doubt that what the learned Lord was considering there was the legal effect of an accord without satisfaction on the original cause of action, and I do not think it right to interpret his words as meaning that no legal effect can be attributed to an accord which contains in fact all the elements which constitute a contract in English law. Some of the cases relied upon are judgments or observations made by so great an authority as Parke B., but there are decisions and observations inconsistent with the proposition put forward by Serjeant Sullivan by this learned judge himself, for example, in *Good* v. *Cheesman* (1), where he quotes with approval the statement in Comyn's Digest Accord (B.4) that " an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement." The learned judge goes on: " Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shown that the party suing had, as far as lay in him, fulfilled his own share of the contract." It is true that these observations related to a case of an agreement to which third persons were parties, but the observations of the learned judge are wide enough to cover a case in which no such third party was concerned. The decision in the case of *Cartwright* v. *Cooke* (2) carries the matter much farther, for there it was held that the agreement, whether subsequently acted upon or not, was a binding accord. In the course of the argument the Court said (3): " This was a good accord as between the parties to the instrument, and binds the plaintiff. The promise of one was a consideration for that of another. Each had an immediate remedy upon it

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(1) 1 Ld. Raym. 122.
(2) (1681) Sir T. Jones, 158; Raym. 450.
(3) 2 H. Bl. 317.
(4) 1 M. & W. 323.

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(1) 1 M. & W. 327.

(2) (1837) 3 Bing. N. C. 915.

(3) (1855) 15 C. B. 622.

(4) (1919) 89 L. J. (K. B.) 186.

(5) [1918] A. C. 35.

(6) (1611) 9 Co. Rep. 77*b*, 79*b*.

(1) 2 B. & Ad. 328, 335.
(2) 3 B. & Ad. 701.
(3) Ibid. 703.

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against the other; and in this respect it falls within the rule in Comyn's Digest Accord B.4, that 'an accord, with mutual promises to perform, is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance.'" The Court in this case consisted of Lord Tenterden C.J., Littledale J., Parke J., and Taunton J. In *Ford* v. *Beech* (1) the Court of Exchequer Chamber held that an agreement which could not be relied upon as an accord and satisfaction could give rise to a right of action for breach. See also *Bradley* v. *Tonge*. (2) In *Crowther* v. *Farrer* (3) the action was upon an agreement which was construed as an accord and satisfaction, but in the course of his judgment Lord Campbell C.J. says (4): "The question is not what would form a good plea in bar to the further maintenance of these actions, but whether this is a good consideration for the defendant's agreement"; and Patteson J. said (5): "Even if it was no more than an agreement on the part of the plaintiffs to refrain from going on, I think that was a sufficient consideration to support the promise of the defendant." See also *Ruck* v. *Brownrigg* (6) and *Flockton* v. *Hall*. (7)

It will be seen that we have not been referred to any case in which it was necessary to decide that an action will not lie on an agreement which is a mere accord, and has not been performed. On the question whether such an agreement can be a binding contract opinions of judges have varied. I therefore feel that we are now entitled to decide the question on principle, and I think at the present stage of the development of the law we ought to decide that an agreement for good consideration, whether it be an agreement to settle an existing claim or any other kind of agreement, is enforceable at law by action if it be an agreement for valuable consideration, and such valuable consideration may consist of the promise of the other party. The old decisions that an accord without satisfaction is no answer to an action on the original cause of action or tort until it has been performed seem to me to be decisions on a question of interpretation. Unless it appears to be intended that the contract itself is to extinguish the liability, this liability can only be extinguished by performance, and if the plaintiff refuses performance of the executory agreement the only remedy the defendant has is to sue him for damages. In the old days this would have had to be done by cross action, but now it may be by counterclaim.

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(1) 11 Q. B. 852.
(2) (1846) 7 L. T. (O. S.) 231.
(3) 15 Q. B. 677.
(4) 15 Q. B. 680.
(5) Ibid. 681.
(6) 2 Ir. Jur. 142.
(7) 14 Q. B. 380.

I think the learned judge's judgment as delivered was right.

With regard to the question relating to the damages, which the judge referred to be assessed by a Taxing Master, and with regard to the directions to be given to him, I have come to the following conclusions. In his oral judgment the learned trial judge directed that the Master should assess the damages on the principle that the defendants are entitled to be put in the same position as they would have been in if the plaintiff Talbot in fact had had the authority which he represented he had. This direction is undoubtedly right, and indeed has not been questioned. I agree that the parties were not entitled to add to this direction the additional words that were inserted in the formal judgment. I have no doubt that the learned judge thought that the damages would consist of items of costs incurred after the date of the breach of warranty of authority. But it does not necessarily follow that the defendants will be entitled to all the costs incurred by them between the date of the breach and the final judgment in the action. It will be necessary for the tribunal assessing the damages to have regard to the rules laid down in *Hadley* v. *Baxendale* (1), which limit the damages recoverable to those which may fairly and reasonably be considered as naturally arising from the breach of contract, or which must be supposed to have been contemplated by the parties to the contract. As regards the action by the company, as the defendants by our judgment have been given their taxed costs against the company they will be

(1) (1854) 9 Ex. 341.

entitled to the difference between their party and party costs and reasonable solicitor and client costs. If they are unable to obtain repayment of any costs they may have paid to the company, or payment of their taxed costs, from the company, these should be added to the difference between solicitor and client costs and party and party costs, so that the defendants will then recover as damages the whole of their solicitor and client costs referable to the action so far as it is concerned with the claim of the plaintiff company from the date of the unauthorized contract, together with the costs, if any, they have already paid to the company and are unable to recover from the company. But with regard to the costs of the action so far as it concerns the claim by the plaintiff Talbot, the tribunal will have to ask and answer the question whether, having regard to the fact that the defendants could have escaped the payment of those costs by accepting the offer made by Mr. Talbot's solicitor to accept 1050*l.* in settlement of his claim and costs, it was reasonable for them to continue to defend the action so far as the claim by Talbot was concerned. It is not for me to say what answer should be given to this question. Though a Taxing Master is perhaps not an ideal tribunal to determine a question of this sort, I do not think we ought to disturb that part of the judgment which refers the assessment of damages to the Taxing Master. Guided by a sufficient direction, I think a Taxing Master will be able to decide the questions involved, and as in any event questions will arise whether items of costs were properly incurred, the Taxing Master will on the whole be not an unsuitable tribunal to assess the damages on the counterclaim. I would add to the learned judge's judgment a direction that in assessing the damages the Master should have regard to the rules laid down in *Hadley* v. *Baxendale* (1), but inasmuch as my brothers think that the direction should be as stated in Scrutton L.J.'s judgment, the Master will be directed by that rather than by what I have said with regard to the direction.

(1) 9 Ex. 341.

SLESSER L.J. I have read the judgments of Scrutton and Greer L.JJ. in these appeals ; I agree with them and find it necessary only to deal with the minor question of the directions to be given to the Taxing Master.

In this matter raised on the appeal in the counterclaim I agree with Scrutton L.J. that it was not unreasonable for the defendants to go to trial on the pleadings, and once the plaintiff company had repudiated the authority of Talbot to make the purported agreement, I see no reason why the defendants should have accepted the offer made by Mr. Talbot to settle a part only of the liability of the consolidated action, or to settle the whole action with added terms if they did not wish so to do.

I am anxious to avoid any possibility of confusion in the directions which the Court are giving to the Taxing Master, and therefore I content myself by saying that I exactly concur with the directions expressed by Scrutton L.J. in his judgment.

Appeal of defendants against the plaintiff company allowed. Appeal of the plaintiff Talbot dismissed.

Solicitors for plaintiffs : *Bowkers.*
Solicitors for defendants : *Lewis & Lewis.*

R. F. S.

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1933
June 20.

WARD *v.* DORMAN, LONG AND COMPANY, LIMITED.

Workmen's Compensation—Fatal Accident—"Dependants"—"Child" under the Age of Fifteen—"Member of a family"—Adopted Child—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 4, *sub-ss.* 1, 3; *s.* 8, *sub-s.* 1 *—Adoption of Children Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 29), *s.* 5, *sub-ss.* 1, 2, 5.

A workman and his wife obtained an order under the Adoption of Children Act, 1926, to adopt a child. Eighteen months afterwards the workman was killed by an accident arising out of and in the course of his employment within the meaning of s. 1 of the Workmen's Compensation Act, 1925:—

Held, that the effect of the adoption order was not to make the adopted child stand to the workman for all purposes in the position of a child born to him in lawful wedlock; that it did not constitute the child a member of the workman's family within s. 8 of the Act of 1925; and accordingly that no compensation was payable by the employers in respect of the adopted child as a dependant on the earnings of the deceased workman.

Appeal from an award of the judge of the Durham County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

On January 3, 1933, the workman, William Ward, met with a fatal accident arising out of and in the course of his employment. He left a widow and an adopted daughter, Gladys, who was born on August 24, 1929, and who had been adopted by the workman and his wife jointly under an order dated November 29, 1932, under the Adoption of Children Act, 1925. The widow claimed compensation on behalf of herself and the adopted daughter Gladys. The employers admitted liability to pay compensation to the widow, and paid 300*l.* into Court, but they disputed their liability in respect of Gladys. It was agreed that in event of her being entitled to claim the amount of the compensation should be 182*l.*

The county court judge held that under the provisions of the Adoption of Children Act, 1926, an adopted child was for all purposes to be a child of the adopter as if born to him in lawful wedlock. He therefore held that Gladys was entitled to claim as a dependant within s. 8 of the

Workmen's Compensation Act, 1925 (1), and made an award for the whole sum of 482*l.*

The employers appealed as to the allowance of the 182*l.* in respect of Gladys. The appeal was heard on June 20, 1933.

W. Shakespeare for the appellants.

J. Charlesworth for the respondents.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. This appeal must be allowed. It raises an interesting point which has been well presented to us on both sides. [His Lordship stated the facts and continued :] The question that we have to decide depends upon the terms of the Workmen's Compensation Act, 1925, and the terms of the Adoption of Children Act, 1926. The learned county court judge at the close of his notes made a short entry in order to give the Court the information of how he reached his decision, and he puts it in this way. He says : "I hold that under the Adoption of Children Act, 1926, s. 5, sub-s. 1, the effect of an adoption order is to make the adopted child stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock. Such a child is therefore a member of the workman's family and a dependant in law upon his earnings at the time of his death, within s. 4 of the Workmen's Compensation Act, 1925, if in fact a dependant, as is admitted in this case."

Mr. Charlesworth, I think quite rightly, says that it is not necessary for him to go so far as to support the first paragraph of those observations of the learned county court judge. It would be sufficient for him to say that this child is a member of the workman's family, and as such, because of the dependence which is admitted in law, entitled to recover. I proceed to deal with the question from that point of view.

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(1) Workmen's Compensation Act, 1925, s. 8, sub-s. 1 : "The compensation under this Act where death results from the injury shall be a lump sum of an amount calculated in accordance with the rules hereinafter contained, together with, if the workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of fifteen so dependent, an additional sum (hereinafter referred to as the children's allowance) of an amount calculated in accordance with the rules hereinafter contained, so, however, that the lump sum and children's allowance (which shall be added together and dealt with as a single sum) shall not in any case exceed in the aggregate six hundred pounds."

The Workmen's Compensation Act, 1925, gave compensation to a workman who suffered a personal injury by accident arising out of and in the course of the employment, and the compensation is not only compensation to him for his total or partial incapacity, but in the case of his death s. 2 provides that compensation shall be payable, where death results from the injury, "to or for the benefit of his dependants as provided by this Act." So we have to turn elsewhere to see who are the persons who are entitled to share in this benefit which is given to the dependants. Sect. 4 says: "The dependants of a workman entitled to claim compensation under this Act where the injury results in death are such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death." It will be observed, therefore, that we have now a test of dependence—namely, such of those dependants as were members of the workman's family. By sub-s. 3 of that s. 4 there is a definition of that phrase, "members of the family," and it is a comprehensive one. It includes a wife or husband, father or mother, it includes grandson or granddaughter, a stepson, a stepdaughter, brothers and sisters and half-brothers and half-sisters; and more than that, there is earlier in sub-s. 1 a provision that legitimacy is not to be a test, and that both in the descent and ascent illegitimacy does not bar the right to compensation. It will be observed, therefore, that there is a wide interpretation given to the "members of the family" who, as dependants, are entitled to receive compensation. Then by s. 8 we have directions for the computation of the amount of compensation under the Act in the case of the persons who are entitled by the previous sections to receive compensation.

Now those sections I have referred to have received interpretation. It will be remembered that the Act of 1925 is a consolidation Act, and one of the cases was decided at a time when the provisions for the persons entitled to compensation at the death were contained not merely in the Act of 1906 but also in the amending Act of 1923. Those two Acts are now put together in the Act of 1925, and therefore I have read the sections from the Act of 1925. But the interpretation has been given in *Pritchard* v. *Bettisfield Colliery, Ld.* (1), where we held that "children" in s. 2 of the Workmen's Compensation Act, 1923, applied to dependent children, and included an illegitimate grandchild. In 1926 the question arose in *Scott* v. *London and North Eastern Ry. Co.* (2) as to whether or not s. 2 of the Workmen's Compensation Act, 1923, included illegitimate children of the widow of a deceased workman, of whom the workman was not the father. It will be observed that in the case of those children, they were not in natural ascent or descent in blood; and we held that the terms of the Act of 1923 did not embrace those illegitimate children of the widow born to a different father, and before the deceased workman had married the wife. That case deals with the matter somewhat fully, and I pointed out in that case in passages which have been read by Mr. Shakespeare that the terms which must be regarded are "the members of the family," and although the statute does not imply matrimony as a test yet it does confine the persons entitled to compensation within the limits of members of the family. Lord Dunedin in *Scott* v. *London and North Eastern Ry. Co.* (3) says: "These children were never members of the workman's family. He had no relationship whatsoever to them; he did not *de facto* have them in his family, and also these children do not fall within the definition of 'dependants' in the Act of 1906." In *Faulkner* v. *Owners of Ship Sutton* (4) it was determined that sisters of the deceased workman fell within s. 2, just as brothers had been decided to do in the case to which I have already referred. In *Shotts Iron Co.* v. *Curran* (1) the House of Lords had to consider the question of whether or not brothers and sisters were included, and the Court held that the benefit of the children's allowance is not confined to the issue of the deceased workman—that is to say, brothers or sisters, for the purposes of the Act, are members of the family, and so included. Lord Hailsham L.C. says (2): "In my judgment the section does include any members of the deceased workman's family who are children under the age of fifteen and who are wholly or partially dependent upon his earnings." Lord Dunedin on the same page says: "I think it is necessary first of all firmly to grasp the fact that the scheme of the Act entirely gives the go-by to notions of legal liability." By that I think he means as to whether or not there could be imposed upon, and enforced, a liability either upon the father to maintain the child, or in certain cases upon the son to contribute to the maintenance of the father. But Lord Dunedin says (3): "So that when 'leaving' is applied indiscriminately to the congeries of persons defined as members of the family I think it obviously means leaving behind." In other words, the House of Lords by their speeches clearly indicated that we have to go back to the test of who are the members of the family. In other words, we come back to s. 4.

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(1) [1925] 2 K. B. 284.

(2) [1926] 2 K. B. 204.

(3) (1926) 19 B. W. C. C. 457, 460; [1926] W. N. 294.

(4) [1927] 1 K. B. 207.

How, then, can it be said that this adopted child was a member of the workman's family? Mr. Charlesworth, adopting the second portion of the county court judge's judgment, says that may be done by s. 5 of the Adoption of Children Act, 1926. I think, however, that when close attention is given to s. 5, it will be plain that that is not so. Sub-s. 1 of that section deals with the obligations of the parent of the adopted child, and of the rights, duties, obligations and liabilities of the adopter in respect of the future custody, maintenance and education of the adopted child, and it clearly and in terms

(1) [1929] A. C. 409. (2) Ibid. 416. (3) Ibid. 418.

deals with those relations between the parent, the adopter, and the adopted child. Thus, for instance, it contains the words "and all such rights, duties, obligations and liabilities," that is as to the future custody, maintenance and education of the adopted child, "shall vest in and be exercisable by and enforceable against the adopter as though the adopted child were a child born to the adopter in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock." Now it will be observed that the section does not simply say that the child shall be deemed to be a child of the adopter for all purposes. It does not deal with the relation of third parties towards the child. It deals specifically with the relation of the child as between the adopter and the child, or as between the father and the child, and the relation by way of transfer, or the transfer between the father and the adopter. But the matter does not end there. For certain purposes the child still has some rights which descend to him and which he retains from the natural father. By sub-s. 2: "An adoption order shall not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under any intestacy or disposition, whether occurring or made before or after the making of the adoption order, or confer on the adopted child any right to or interest in property as a child of the adopter, and the expressions 'child,' 'children' and 'issue' where used in any disposition whether made before or after the making of an adoption order, shall not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child." Mr. Charlesworth says: "Yes, that is quite true, but that section only deals with property." The answer may yet be made that the reflex effect of sub-s. 2 on s. 1 is to show that s. 5 as a whole does not simpliciter make an adopted child to be deemed to be for ever after for all purposes the child of the adopter.

Then I need not stop at sub-s. 3, although that is important from the same point of view. But by sub-s. 5 certain enactments are considered, and the following definite provision is made: "For the purposes of the enactments relating to friendly societies, collecting societies and industrial assurance companies, which enable such societies and companies to insure money to be paid for funeral expenses, and which restrict the persons to whom money may be paid on the death of a child under the age of ten, the adopter shall be deemed to be the parent of the child." It will be observed at once that having, as I have already said, by the terms of sub-ss. 1, 2 and 3 defined the effect and limit of an adoption order, sub-s. 5 goes on to introduce, or to determine, what is to be the position of the adopted child in relation to certain enactments. Sub-s. 5 does not refer to the Workmen's Compensation Act. It does not say that for the purpose of s. 4, sub-s. 3, of the Workmen's Compensation Act the child is to be deemed a member of the adopter's family. That silence is significant. It places a difficulty in Mr. Charlesworth's way. The introduction and the specific dealing with certain enactments obviously calls into view the silence upon others. It does not appear, therefore, that a closer consideration of s. 5 as a whole could possibly support the view taken by the learned county court judge, that the effect of the adoption order is to make the adopted child stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

Coming, then, to the second limb of the judgment, is the child a member of the workman's family within s. 4 of the Workmen's Compensation Act? The answer is that he is not a member of the family; and when one turns to see if he has been made a member of the family, and introduced into sub-s. 3 of s. 4 of the Workmen's Compensation Act, the answer is in the negative; he has not been so introduced into the Workmen's Compensation Act.

Under these circumstances, it appears not possible to treat this child as a member of the workman's family, and not being a member of the workman's family she cannot be held to be within the definition clause, and therefore there is no compensation for which the employers are liable.

The result is that the appeal must be allowed.

LAWRENCE L.J. I agree. The ground upon which the learned county court judge based his decision was that an adoption order under the Adoption of Children Act, 1926, operated to make the adopted child stand to the adopter for all purposes in the position of a child born to the adopter in lawful wedlock. In my judgment, that broad view of the effect of an adoption order is untenable, and, indeed, Mr. Charlesworth has not attempted to support the judgment on that ground. It is important, however, in view of the argument addressed to us by Mr. Charlesworth, to examine somewhat closely what effect an adoption order really has. Sect. 5, sub-s. 1, of the Act deals with the rights, duties, obligations and liabilities as between the adopter and the adopted child, and sub-ss. 3 to 4 deal with the property rights of the adopted child and matters incident thereto. As regards all these rights and obligations, it is important to remember what Lord Dunedin said in *Shotts Iron Co.* v. *Curran* (1), when speaking of the Workmen's Compensation Act, 1925—namely (2): "It is necessary first of all firmly to grasp the fact that the scheme of the Act entirely gives the go-by to notions of legal liability." Therefore, in considering the issue raised in the present case, the Court has to give the entire go-by to the legal rights and liabilities created by the first four sub-sections of s. 5 of the Act of 1926. Nothing is said in those sub-sections as to any liability of third parties (such as the employers of the adopter) in regard to the adopted child. Sub-s. 5 contains a provision that in certain cases the adopted child is to be treated by third parties as if it were a child born to the adopter in lawful wedlock. That provision, however, is limited expressly to enactments relating to friendly societies, collecting societies, and industrial

(1) [1929] A. C. 409.

(2) Ibid. 416.

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assurance companies; the Workmen's Compensation Act is not mentioned. It is perhaps interesting to note that the Act of 1926 did not apply to Scotland, and that when in the year 1930 a similar Act was passed applying to Scotland it was expressly enacted (s. 5, sub-s. 2) that an adopted child should be treated as the child of the adopter for the purpose of (inter alia) the Workmen's Compensation Act, 1925. Although the Act of 1930 cannot affect the construction of the Act of 1926, it tends to confirm the view that the Legislature by enacting s. 5 of the latter Act did not intend to place an adopted child in the position of a child born to the adopter in lawful wedlock for all purposes but only for the specific purposes mentioned in that section and no further.

The question in the present case, therefore, resolves itself into whether, notwithstanding the scope of s. 5 is limited in the manner I have indicated, Mr. Charlesworth was right in contending that s. 4 of the Workmen's Compensation Act, 1925, ought to be construed as embracing a child adopted under the Act of 1926 on the ground that such a child was a member of the family in the popular sense, as it was living with the workman who had adopted it, and was dependent upon him under the provisions of the Act of 1926. As I understand it, his contention was, that as it had been held that children in s. 8 meant children irrespective of whether they were children of the workman or not, therefore it followed that the Court ought to hold that children meant children who had been adopted by the workman irrespective of whether they were members of his family as defined by sub-s. 3 of s. 4, or not. In my judgment, that contention is not well founded. It is true that the word "child" is not defined in s. 4; it is also true that the word "children" in s. 8 has been held not to be confined to children of the workmen; but bearing in mind that s. 4 defines the only dependants of the workman who are entitled to compensation, it follows that no child who does not come within that definition is entitled to compensation. If any authority for that were wanted, I think it is to be found in the decision of the House of Lords in *Shotts Iron Co.* v. *Curran* (1), where it was held that the expression "children" in s. 8 of the Act meant such members of the family as defined by the Act as were children although not necessarily children of the deceased workman. This decision recognizes that in order to be entitled to compensation a child must first bring itself within the definition of "members of the family" contained in s. 4, and it is plain from the wording of that section that an adopted child does not fulfil this condition. In my judgment if the Court were to accede to the argument presented by Mr. Charlesworth (however desirable the result might be) it would be extending and not construing the provisions of the relevant statutes.

For the reasons stated I think that this appeal ought to be allowed.

SLESSER L.J. I agree that this appeal must be allowed. The dependant here is a young girl, Gladys, who had been adopted by the deceased workman and his wife, but although it appears that she is a dependant in fact, it is also necessary for her to satisfy the section under which the employer becomes liable to pay compensation, and for her to show that she is a member of the workman's family. Now the words "member of a family" are defined in sub-s. 3 of s. 4 of the 1925 Act as including "daughter," and the question which here arises is whether by reason of the operation of the Adoption of Children Act, 1926, this child on whose behalf an adoption order has been made can be said to be a daughter. Apart from that Act, it would be quite impossible, merely because she was a dependant, to say she was a daughter, as I have said, or to say she was a member of the family.

The Adoption of Children Act, 1926, is the first statutory recognition of the position of adopted children, and being as it is a considerable invasion of the common law as it existed before that Act, it must be closely scrutinized; and when that Act is examined, it is quite clear to my mind that the statement in this case of the learned county court judge that the effect of the Adoption of Children Act, 1926, s. 5, sub-s. 1, is to make the adopted child stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock, is not correct. For certain defined purposes an adoption order has the effect of transferring rights, duties, obligations and liabilities of the parent of the adopted child to the adopter; but, as my Lords have pointed out, the section is at pains in sub-s. 2 and sub-s. 5 to exclude the effects which might otherwise arise if the adopted child were treated for all purposes as the child of the adopter. Thus, with regard to interests in property; they are specially dealt with in sub-s. 2, and in certain cases those interests are preserved to the child in the estate of its own lawful parents. Then by sub-s. 5, when it is desired that the adopter for the purposes of that sub-section shall be deemed to be the parent of the child, that is limited to enactments relating to friendly societies, collecting societies, and industrial assurance companies. I should have expected to have found in that sub-section some specific reference to the Workmen's Compensation Act if Mr. Charlesworth's argument were correct; but it is not there. And it is interesting to observe (in addition to the Scottish Act dealing with the adoption of children to which reference has been made) that the Legitimacy Act, 1926, gave, under certain circumstances, to a child born before wedlock and subsequently legitimated under that Act, certain rights. It was there provided that a legitimated child shall have the same rights and be under the same obligations in respect of maintenance and support, and subject to the provisions of that Act, the provisions of any other Act relating to claims for compensation should apply in like manner as in the case of legitimate persons. Those words are missing in the Adoption of Children Act, 1926. It is therefore impossible in my view to say that this child is the daughter of the deceased, and not being the daughter she cannot be said to be a member

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(1) [1929] A. C. 409.

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of the family within the section and therefore the appeal must be allowed on that basis.

Appeal allowed.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

Solicitors for respondents: *Sayer, Ledgard & Smith, for Thomas Jennings, Bishop Auckland.*

W. I. C.

WHEELER *v.* NEW MERTON BOARD MILLS, LIMITED.

K. B. D.
1933
Feb. 8, 9, 27.
C. A.
July 18.

[1932. W. 110.]

Master and Servant—Injury to Servant—Dangerous Machine in Factory—Breach of Statutory Duty—Negligence of Foreman—Liability of Master—Common Employment—Volenti non fit injuria—"Wilful act" of Master—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10, *sub-s.* 1 (*c*) (*d*)—*Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 29, *sub-s.* 1.

The defendants installed in their factory as part of the plant with the intention that it should be used by their employees a dangerous machine which was not fenced or guarded as required by the Factory and Workshop Act, 1901. Owing to the condition of the machine the plaintiff, a workman in the employment of the defendants, was injured by it in the course of his work. It was found that it was not by the negligence of the defendants but of their foreman that the machine had been allowed to be used in the condition in which it was at the time of the accident:—

Held, by Talbot J., following *Baddeley* v. *Granville* (*Earl*) (1887) 19 Q. B. D. 423, that the defence of volenti non fit injuria had no validity against an action based on breach of statutory duty; and further that the plaintiff's injury was caused by the "wilful act" of the defendants within the meaning of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, and the defendants were therefore not protected by that section from liability to the plaintiff independent of the Act.

Rudd v. *Elder Dempster & Co., Ld.* [1933] 1 K. B. 566 principles applied, but facts distinguished.

The defendants appealed, and contended that the maxim "Volenti non fit injuria" was a defence to the action, and that *Baddeley* v. *Granville* (*Earl*) (supra) was wrongly decided.

Held, dismissing the appeal, that the defence of volenti non fit injuria was no answer to a claim made by a workman against his employer for injury caused through a breach by the employer of a duty imposed upon him by statute. *Baddeley* v. *Granville* (*Earl*) (supra), which had so decided in 1887, had been the law for nearly fifty years, and it was now too late for that Court to interfere with the decision.

Per Slesser L.J. The principles laid down in *Baddeley* v. *Granville* (*Earl*) had been approved by the Court of Appeal in *Groves* v. *Wimborne* (*Lord*) [1898] 2 Q. B. 402.

FURTHER CONSIDERATION of an action tried by Talbot J. and a jury.

In September, 1931, the plaintiff, Edwin G. Wheeler, an infant, eighteen years of age, entered the employment of the defendants, the New Merton Board Mills, Ld., as a labourer in their factory at Merton Abbey, S.W., in the county of London. He was put to work at a machine for cutting cardboard by sharp knives rapidly revolving, which was not fenced or guarded as required by the Factory and Workshop Act, 1901. From time to time in the course of his work he was obliged or allowed to pull out cardboard which had become involved in and clogged the cutting part of the machine while it was in motion, a proceeding which sometimes required a hard pull. He was continuously on that work up to the date of the occurrence next mentioned. On December 23, 1931, while he was clearing the machine his left hand and arm were drawn into it and the arm was clean cut off between the elbow and the wrist.

On January 8, 1932, the infant plaintiff, suing by his father, Thomas Wheeler, as his next friend, and the said Thomas Wheeler brought the present action against the defendants, the claim of the infant plaintiff being to recover damages for these personal injuries on the ground that they were caused by the negligence of the defendants, their servants or agents, or alternatively by a breach of their statutory duty, and the claim of the father being for expenses in connection with the injury.

The defendants stated in defence that they were not negligent or guilty of any breach of statutory duty; that if they were, the plaintiff was guilty of contributory negligence; and that as to the claim in negligence they relied upon the doctrines of volenti non fit injuria and common employment, the particulars given of the latter defence being that if the plaintiff proved that any of the defendants' servants or agents were negligent as alleged these servants or agents were fellow-servants of the infant plaintiff; and they further pleaded by amendment duly made s. 29 of the Workmen's Compensation Act, 1925. (1)

The action was tried in November, 1932. The infant plaintiff in the course of his evidence described the accident as follows: "I had just come back from another machine. I saw cardboard getting twisted round the knives. I walked over and tried to pull it out. It pulled my hand under." It was proved that the machine could readily be stopped by a lever; that it was never the practice to stop it when it was necessary to pull out cardboard; that the foreman who set the plaintiff to work when he first came told him nothing about stopping the machine; that when the foreman pulled out cardboard from the knives so that the plaintiff should see how to do it the machine was not stopped; and that the plaintiff did not in fact know that it could be stopped by the lever till he had been at work a week.

The following questions, which had been discussed with counsel and accepted as proper, were put to the jury, who returned the following answers:—

1. Q.—Was the machine unguarded dangerous? A.—Yes.

2. Q.—Did the defendant company intend their employees to use this machine? A.—Yes.

3. Q.—Were the defendant company negligent (*a*) in their system of instruction upon and use of the machine? (*b*) in causing or allowing the machine to be used in the condition in which it was on the day of the accident?

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(1) Workmen's Compensation Act, 1925, provides:—Sect. 29: "(1.) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

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A.—No evidence that defendant company was negligent, but we agree foreman was negligent.

4. Q.—Did the matters mentioned in 1, 2 and 3 (*a*) and (*b*) cause the accident ? A.—Yes.

5. Q.—Did the plaintiff undertake the work knowing the danger and taking the risk ? A.—Yes.

6. Q.—Damages ? A.—1586*l*. 5*s*. for infant plaintiff and 8*l*. 15*s*. 6*d*. for the father.

The case of *Rudd* v. *Elder Dempster & Co., Ld.* (1), was then pending before the Court of Appeal, the decision of which it was thought might bear on the question what judgment should be entered on these findings, and Talbot J. was asked by both sides to postpone the further consideration of the case, and consented to do so.

On December 16, 1932, the judgments of the Court of Appeal were delivered in *Rudd's* case. (1)

On February 8 and 9, 1933, the present case was argued on further consideration.

Hilbery K.C. and *Fox-Andrews* for the plaintiffs.

G. J. Paull and *J. H. Goldie* for the defendants.

Cur. adv. vult.

Feb. 27. The following written judgment was delivered :—

TALBOT J. This action was brought by the infant plaintiff (whom I will call the plaintiff), suing by his father as his next friend, to recover damages for an injury sustained in the course of his employment by the defendant company ; the father sued for certain expenses incurred by him in consequence of the injury. The action was grounded upon negligence and breach of statutory duty by not fencing dangerous machinery as required by the Factory and Workshop Act, 1901. [His Lordship stated the facts substantially as above set out and the findings of the jury, and continued as follows :] At the time when the action was tried, namely in November last, a case was pending before the Court of Appeal the decision of which it was thought might bear on the question what judgment should be entered on these findings, and I was asked by both sides to postpone the further consideration of the case. It was accordingly argued on further consideration on February 9 of this year, and I have had the advantage of considering a transcript of the judgments of the Court of Appeal in *Rudd* v. *Elder Dempster & Co., Ld.* (1), delivered on December 16, 1932. The plea of contributory negligence was not supported by evidence or argument. The defence of common employment is excluded, so far as the action is for breach of statutory duty, because, there being an absolute duty on the employer, he cannot throw responsibility for failure to perform it on another: *Groves* v. *Wimborne* (*Lord*). (2) There is no dispute that here there was a breach of s. 10, sub-s. 1 (*c*) (*d*), of the Factory and Workshop Act, 1901. The machine was dangerous and it was not fenced, The defendants cannot get in the defence of common employment by saying that the plaintiff relies on the same facts as negligence at common law apart from statute. If in fact they were a breach of the statute, common employment is no defence to an action for damages resulting from the breach, whether there was negligence or not: *Watkins* v. *Naval Colliery Co.* (3) (in which case the findings of the jury are set out in the report of the proceedings in the Court of Appeal (3)); see particularly per Lord Haldane L.C. (4) See also *Pursell* v. *Clement Talbot, Ld.* (5)—a case closely resembling the present; see the findings of the jury there. These decisions appear to me really to settle the question raised by Vaughan Williams L.J. in *Groves* v. *Wimborne* (*Lord*) (6), which I take to be this: whether in an action by a workman against his employer for damage by breach of an absolute statutory duty, the plaintiff can succeed if it is proved that though the employer failed to discharge the duty yet no injury would have ensued "but for the additional fact of negligence on the part of a fellow-servant" (1), such as would let in the defence of common employment. The Lord Justice does not decide that common employment would be a good defence in such a case, but he says that as then advised he is not prepared to decide the contrary. Both in *Watkins* v. *Naval Colliery Co.* (2) and in *Pursell* v. *Clement Talbot, Ld.* (3), the jury (as in the present case) expressly found that the defendant company was not negligent, but that their manager and mechanical engineer (in *Watkins*' case (2)) and a foreman (in *Pursell's* case (3)) were negligent, and that the injury, the subject of the action, was partly caused by that negligence. The judgment in favour of the plaintiffs in those cases appears to decide the question raised by Vaughan Williams L.J., though no doubt there is some difficulty in reconciling the decision with what appears to be the result of the authorities, and is emphatically affirmed by the Lord Justice in *Groves*' case (1), that contributory negligence is a good defence to an action for breach of an absolute statutory duty. The two things are put by the Lord Justice on the same principle —namely, that negligence, whether of the plaintiff or a fellow-servant, if it formed part of the cause of the injury, prevents the injury from being wholly attributable to the breach of statutory duty. I should like to add, speaking, I need not say, with the greatest possible respect, that the instance selected by the Lord Justice (4) does not seem to be sound, at any rate, as applied to the Factory and Workshop Act, 1901. He supposes a case in which proper fencing is provided by the occupier of the factory, but an accident happens because some one in his service wilfully or negligently removes it. To say that in such a case the occupier is not liable, because he has not failed to perform his statutory duty, appears to overlook the fact expressly mentioned by the Lord Justice (4), that the Act requires him not only to fence the dangerous parts of the machinery, but also to maintain the fencing constantly in an effective state while

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(1) [1933] 1 K. B. 566.

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(1) [1933] 1 K. B. 566.
(2) [1898] 2 Q. B. 402.
(3) [1912] A. C. 693, reversing C. A. [1911] 2 K. B. 162.
(4) [1912] A. C. 702, 703.
(5) (1914) 111 L. T. 827.
(6) [1898] 2 Q. B. 402, 418.

(1) [1898] 2 Q. B. 419.
(2) [1912] A. C. 693.
(3) (1914) 111 L. T. 827.
(4) [1898] 2 Q. B. 402, 418.

the parts required to be fenced are in motion or use. If an accident happens while and because the fencing is not in place, it is the direct result of the occupier's breach of his duty to maintain it constantly in an effective state, and he cannot escape it (any more than the duty to fence), or the consequences of breach of it, by delegating the observance of it to anyone else. It is to be noticed, moreover, that by failure to obey s. 10 the factory is made a factory not kept in conformity with the Act (sub-ss. 1 and 2), and that this subjects the occupier to a fine (s. 135, sub-s. 1).

With regard to the defence commonly known as that based on the maxim "Volenti non fit injuria," it is settled so far as this Court is concerned by *Baddeley* v. *Granville* (*Earl*) (1) (followed by *Davies* v. *Thomas Owen & Co.* (2)), that that has no validity against an action based on breach of absolute statutory duty, and (as in the case of common employment) a defendant cannot, merely because the same facts may constitute a cause of action at common law, defeat the rule that no acquiescence or consent can disentitle a plaintiff to recover for what in fact is a breach of statute for which an action lies.

I may add, as the question was fully argued, that in my opinion the answer of the jury to Question 5 was entirely justified by the evidence; and I say this notwithstanding that the plaintiff said in the witness-box that it did not occur to him that the work was dangerous. I agree with the argument for the defendants, that a lad of eighteen cannot be heard to say that he did not perceive that pulling cardboard strips away from sharp knives rapidly revolving is attended with danger; nor do I believe that he meant to say so. I have no doubt that the jury understood him (as I did) to mean that he thought he could do the work without hurting himself, as indeed he did for three months, and as two other witnesses had done for something like a year. In my opinion, however, for the reasons which I have stated, neither volenti non fit injuria nor common employment are defences open to the defendant company in this action.

(1) 19 Q. B. D. 423.

(2) [1919] 2 K. B. 39.

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There remains only the defence based on s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. The construction of the sub-section, so far as it is material to this case, has, in my opinion, been settled by the Court of Appeal in the case already mentioned of *Rudd* v. *Elder Dempster & Co., Ld.* (1) It may be stated thus: an action to recover damages in respect of an injury for which compensation can be awarded under the Workmen's Compensation Act lies only if it be proved that the injury was caused (1.) by the personal negligence or wilful act of the employer, or (2.) by the personal negligence or wilful act of some person for whose act the employer is responsible, and this does not include a fellow-servant of the plaintiff by reason of the doctrine of common employment. This construction is, of course, binding on me, and in order to see what is its application to the case before me, I must look again at the findings of the jury. By their answer to Question 4 they find that the accident was caused by the dangerous nature of a machine on which the defendant company intended the plaintiff to work; and by the negligence of the foreman in instructing the workman as to the work to be done at the machine, and as to the use of it, and in causing or allowing the machine to be used in the condition in which it was on the day of the accident. By their answer to Question 3 they find that the defendant company was not negligent in its system of instruction upon and use of the machine, or in causing or allowing it to be used in the condition in which it was on the day of the accident. I have somewhat modified the words of the questions and answers, but I believe I have stated their effect correctly.

It was not disputed that the foreman, whom the jury found to have been negligent, was a fellow-servant of the plaintiff; or that (apart from statute) to an action against the company for his negligence common employment would have been a good defence; and therefore, according to the construction laid down by the Court of Appeal, the company is protected by the Workmen's Compensation Act from

(1) [1933] 1 K. B. 566.

liability for his acts or defaults, because they were not responsible for them. It follows that the plaintiff's action must fail unless he has proved personal negligence or wilful default of the company itself.

There are passages in the judgments of the Lords Justices in *Rudd's* case (1) which taken alone might appear to lay it down that the Act of 1925 protects employers from any action whatever by an employee for breach of statutory duty; but it was not argued, nor do I think, that this was intended. It seems impossible to construe s. 29, sub-s. 1, as excluding liability in cases where personal negligence or wilful act of the employer is proved, whether it is for breach of statutory duty or not. I think that the expression used by Scrutton L.J. and Lawrence L.J., "mere breach of statutory duty," must mean breach not involving the employer's personal negligence or wilful act; and I think that Greer L.J. must have meant the same, though he expressed himself in more unqualified language. As I understood the argument, counsel for the defendant company accepted this.

The question remains whether in the present case either personal negligence or wilful act of the defendant company was proved. The jury declined to find negligence in respect of the matters mentioned in Question 3, and I think the provision of a dangerous machine with the intention that it should be used by the company's workmen, which the jury did find, is more properly described as an act than as negligence. Was it, then, a wilful act, and, if so, was it a wilful act of the company? "Wilful act" is plain English, and I can entertain no doubt that the installing of this machine without guard or fence for use in the factory was a wilful act by some one. It was an act, and it was intentional. It is true that though "wilful" and "intentional" are synonymous (as Greer L.J. says in his judgment (2)), "wilful" is more commonly used in modern speech of bad conduct or actions than of good, though it does not necessarily connote blame (see per Bowen L.J. in *In re*

(1) [1933] 1 K. B. 566.

(2) Ibid. 602.

Young and Harston's Contract (1); but that is far from supporting the strange contention that wilful act in s. 29, sub-s. 1, must be confined to something done with intent to injure. It seems to me an appropriate way of describing the deliberate provision of this machine for use in the factory, quite apart from the Factory and Workshop Act. But the jury's findings amount to a finding that there has been intentional breach of the statute. This there clearly was, and indeed it was not disputed; that is, there was an intentional doing of that which was in fact a breach of the Factory and Workshop Act. I should think that the directors and responsible officers of the company probably knew quite well that it was such a breach, but whether they did or not is immaterial, if they intended to do it, and it was in fact a breach.

The only question left is whether it was an act of the company. Such words as "wilful" or "intent" or "act" can only be applied to a company by metaphor. A company is a legal abstraction, and when it is said to do or intend or will anything it is meant that some person or persons whose acts or intentions can properly be imputed to the company have done or intended the thing. It was not argued that the words about personal negligence or wilful act in s. 29, sub-s. 1, do not apply to a company. So to argue would be contrary to the whole tenor of the judgments in *Rudd's* case (2): see also *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (3); and indeed, when one considers the great proportion of employed persons whose employers are companies, it would be a very unreasonable construction of a modern statute. But it was said, on grounds which I confess I find it difficult to understand, that what was done in the present case could not be said to have been done or intended by the company. I do not attempt to define the persons whose acts or intentions are for the purposes of the statute to be considered the acts and intentions of the company; nor the circumstances in which they must be done or formed in order

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(1) (1885) 31 Ch. D. 168, 175.
(2) [1933] 1 K. B. 566.
(3) [1915] A. C. 705.

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to be so considered. It is enough to say that in my opinion if a machine constructed in a particular form which is obvious to the most casual inspection is installed as part of the standing plant of a factory, in order to be used regularly in the work for which the factory exists, the act by which and the intention with which it is installed are for the purposes of this enactment at least prima facie the act and intention of the occupiers of the factory who are the employers of the workmen. This is in my judgment what the plaintiff proved and the jury found. The defendant company called no evidence, and in my opinion the plaintiff's evidence uncontradicted justifies the findings of the jury and establishes "wilful act" of the defendant company for which they remain liable under s. 29, sub-s. 1, of the Act of 1925. It would be quite unreasonable in a case like this to require a plaintiff to prove a resolution of the directors, or an order by some official in a position of special authority. I may illustrate this by adding that it seems clear from *Rudd's* case (1) that if the Court had considered there that there was evidence that the system of loading regularly used in the dock was unsafe, as the jury found, that would have constituted personal negligence, or wilful act, or both, of the company itself: see, e.g., per Scrutton L.J. (2) In connection with this point I wish to notice the great difference between the facts of this case and those of *Rudd's* case. (1) There the accident sued upon happened in the course of loading some angle-irons on to a ship out of a barge. The irons were lifted from the barge in a sling by a rope, and ultimately lowered into the ship. In the course of the operation the ropes used were exposed to severe friction. Without going into the details of the process, which are described fully in the judgment of Scrutton L.J., it is enough to say that a rope broke, apparently from heating caused by friction, and dropped the irons on the plaintiff, who was below. The evidence showed that a rope, perfectly good when issued, might very rapidly become unsafe through friction, and that the amount of friction and therefore the

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(1) [1933] 1 K. B. 566.

(2) Ibid. 576, 580.

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danger might vary greatly during the operation; and for this reason (as the Court held) it was necessary to entrust the safe working of it to the vigilance and skill of the man actually conducting it. It was found that the loading had been done in the same way in the port for many years without serious accident, and that the men who were doing it when the plaintiff was injured were thoroughly experienced and skilled. The plaintiff's case alleged (1.) personal negligence of the company in using an unsuitable system; (2.) breaches of statutory duty. The Court of Appeal held that there was no evidence to support a verdict against the company on the first point. As to the second, the regulations relied on were two made under s. 79 of the Factory and Workshop Act, 1901—namely, reg. 20: "No rope shall be used in holding or lowering unless (1.) it is of suitable quality and free from patent defect." Reg. 30: "No . . . . lifting appliance shall be loaded beyond the safe working load," the word "quality" in reg. 20 being held to mean quality when issued for use, and "patent defect" to mean patent defect at the commencement of the operation. The Court held that there was no evidence that the rope was not of suitable quality when issued for use; but that there was some evidence of patent defect when the loading began. The Court also held that there was no evidence that the load was unsafe at the commencement of the operation. It appears to have been argued for the plaintiff that there being a breach of an absolute statutory duty in the use of a rope having a patent defect, the company was liable whether or not they could be said to have known of the defect, or to have been negligent in the issue; and it was in this connection that it became necessary to consider s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, and the sense in which personal negligence or wilful act can be imputed to a corporation. The opinion of the Court of Appeal on this can be stated in the words of Scrutton L.J. (1) and of Lawrence L.J. (2) Scrutton L.J. said: "A corporation cannot be negligent in itself but, as an employer,

(1) [1933] 1 K. B. 566, 576.

(2) Ibid. 594.

is liable to its workmen for the negligence only of its governing body, directors, or general manager. This kind of point is also discussed in *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1) on the liability of the shipowner for 'damage happening without his actual fault or privity': see per Lord Haldane. (2) The company is liable for 'the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.'" (3) Lawrence L.J. puts it: "As the defendants are a limited company, this onus"—that is the onus of proving personal negligence or wilful act on their part—"would be discharged by proving that the injury was caused by the personal negligence or wilful act of some person acting for the defendants, other than a fellow workman of the plaintiff"—that is the man injured—"such as, e.g., the managing director or the general manager, or other person having authority from the board of directors to conduct the company's business." (4) The cause of the damage in the present case is the provision by the defendant company for use in its factory of a machine obviously dangerous without adding the protection against the danger expressly required by statute passed for ensuring the safety of workmen. In *Rudd's* case (3) it was the fact that a rope, perfectly sound and proper when issued for use, had become weak and inefficient in the course of an operation for which it was proper to use it, it being a matter of nice discrimination and skill on the part of those in actual charge of the operation to judge the moment at which the friction on the rope, which must sooner or later make it necessary to discard it, had reached the point. It is unnecessary to enlarge upon the fundamental distinction between the two cases.

My conclusion is that all the three defences relied on by the defendant company fail, and that the plaintiffs are

(1) [1915] A. C. 705.
(2) Ibid. 713, 714.
(3) [1933] 1 K. B. 566, 576.
(4) Ibid. 594.

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entitled to judgment for the damages found by the jury, with costs.

Judgment accordingly.

J. R.

The defendants appealed. There was also a cross-appeal by the plaintiff against the finding of the jury in answer to Question 5. The appeal and cross-appeal were heard on July 18, 1933.

Cave K.C. and *G. J. Paull* for the appellants. Having regard to the decision of the House of Lords in *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1) it cannot now be contended that the appellants are protected by s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, against proceedings independently of that Act. It is, however, contended that the maxim "Volenti non fit injuria" is a defence to such an action. *Baddeley* v. *Granville* (*Earl*) (2), upon which Talbot J. relied as an authority that the maxim has no validity against an action based on breach of statutory duty, was wrongly decided. A Divisional Court consisting of Wills and Grantham JJ. decided in that case that the defence arising from the maxim "Volenti non fit injuria" was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer. The Court came to their decision in that case owing to some observations made by Bowen L.J. in *Thomas* v. *Quartermaine* (3) which were not necessary for the decision of that particular case. Bowen L.J. there said (4): "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognisant of the full extent of the danger, and voluntarily run the risk. Volenti non fit injuria. . . . . It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier

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(1) [1933] W. N. 192; 49 Times L. R. 566.

(2) 19 Q. B. D. 423.

(3) (1887) 18 Q. B. D. 685.

(4) Ibid. 695, 696, 697.

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must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not '*scienti* non fit injuria,' but '*volenti*.' It is plain that mere knowledge may not be a conclusive defence. . . . . There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. The case of *Clarke* v. *Holmes* (1) is a case of that sort, and has been so explained subsequently by judges of authority. . . . . The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which but for a breach of duty on his own part would not exist at all." Fry L.J. did not go the length that Bowen L.J. went. He merely said (2): "Knowledge is not of itself conclusive of the voluntary character of the plaintiff's actions: there are cases in which the duty of the master exists independently of the servant's knowledge, as when there is a statutory obligation to fence machinery," and Lord Esher M.R. expressed a different opinion altogether. In *Davies* v. *Thomas Owen & Co.* (3) Salter J. merely followed *Baddeley* v. *Granville* (*Earl*) (4) in holding that the maxim "Volenti non fit injuria" affords no defence where the plaintiff can show that the injury he has sustained has been the direct consequence of a breach by the defendant of an express statutory duty imposed upon him. But in that case the contrary was not argued, the point being conceded. In *Britton* v. *Great Western Cotton Co.* (5), where a fly-wheel had not been fenced, the Court held that the deceased was not a volunteer, as there was no evidence to show that he must necessarily have known the dangerous character of the employment. Bramwell B. said (6): "Assuming, however, that he did share his employers' knowledge, it must be remembered that the liability of the defendants here is not at common law but by statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed."

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(1) (1862) 7 H. & N. 937.
(2) 18 Q. B. D. 703.
(3) [1919] 2 K. B. 39, 42.
(4) 19 Q. B. D. 423.
(5) (1872) L. R. 7 Ex. 130.
(6) Ibid. 138.

[SLESSER L.J. *Groves* v. *Wimborne* (*Lord*) (1) is very much against your contention. The Court of Appeal there held that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection. I do not see why that principle should not also apply where the maxim "Volenti non fit injuria" is relied upon as a defence.]

The defence of common employment only applies to a case where the servants of the same employer are concerned, but the defence of the maxim is much wider. Unless there is no distinction between the doctrine of common employment and the maxim "Volenti non fit injuria" the decision in *Groves* v. *Wimborne* (*Lord*) (1) does not apply to the present case. There are observations upon *Thomas* v. *Quartermaine* (2) in *Yarmouth* v. *France* (3), where Lord Esher said (4): "Taking the whole of that judgment together it seems to me to amount to this, that mere knowledge of the danger will not do: there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim Volenti non fit injuria." In *Clarke* v. *Holmes* (5) there was no finding that the plaintiff knew of the defect so as to bring him within the maxim "Volenti non fit injuria." The judgment in the Court of Exchequer (6) proceeded on the ground that there had been a breach by the defendant of a statutory duty, but in the Exchequer Chamber the action was transformed into a claim for negligence on the part of the defendant. In *Torrance* v. *Ilford Urban District*

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(1) [1898] 2 Q. B. 402.
(2) 18 Q. B. D. 685.
(3) (1887) 19 Q. B. D. 647.
(4) 19 Q. B. D. 657.
(5) 7 H. & N. 937.
(6) (1861) 6 H. & N. 349.

Council (1) the Court of Appeal held that because the plaintiff's servant elected to run the risk which caused the accident after he had an opportunity of seeing and appreciating the risk, therefore the plaintiff could not recover. The maxim "Volenti non fit injuria" is as old as Homer and Aristotle. Contributory negligence, if made out, is a good answer to an action for negligence, and there is no reason why the maxim "Volenti non fit injuria" should not also be a good defence.

[SLESSER L.J. *Vincent* v. *Southern Ry. Co.* (2) is the only case, since the decision in *Groves* v. *Wimborne* (*Lord*) (3), where contributory negligence has been held to be a defence to an action for breach of a statutory duty.]

A workman is not left without remedy, as he can recover under the Employers' Liability Act. It is clear that the cases upon which *Baddeley* v. *Granville* (*Earl*) (4) purported to be decided do not support the proposition for which they were cited. Having regard to the older cases, especially *Britton* v. *Great Western Cotton Co.* (5), it is evident that proper consideration was not given to the decision in *Baddeley* v. *Granville* (*Earl*) (4), and that decision ought not to be followed now. The fact that the decision has stood for nearly fifty years is no answer to the contention that it is a wrong decision.

N. R. Fox-Andrews (*Hilbery K.C.* with him) for the respondent. The decision of the Court below in the present case was right. It was held by the Court of Appeal in *Higgins* v. *Harrison* (6) that an action for breach of the employer's statutory duty to fence failed because, on the evidence, the machine was not a dangerous machine within the meaning of s. 10 of the Factory and Workshop Act, 1901, and therefore there was no duty on the employer to fence it, and further that the accident was caused by the contributory negligence of the plaintiff, which was a complete defence to the action. The distinction between the defence of contributory

(1) (1909) 25 Times L. R. 355.
(2) [1927] A. C. 430.
(3) [1898] 2 Q. B. 402.
(4) 19 Q. B. D. 423.
(5) L. R. 7 Ex. 130.
(6) (1932) 25 B. W. C. C. 113.

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negligence and the maxim "Volenti non fit injuria" is that where there is contributory negligence on the part of the plaintiff there has been a break in the chain of causation, but where the maxim applies there is no break in the chain of causation. The decision in *Baddeley* v. *Granville* (*Earl*) (1) has been accepted as being good law ever since it was decided, and it has now stood for many years. In Pollock on Torts, 13th ed., p. 536, it is stated that "Liability under the rule in *Indermaur* v. *Dames* (2) may be avoided not only by showing contributory negligence in the plaintiff, but by showing that the risk was as well known to him as to the defendant, and that with such knowledge he voluntarily exposed himself to it; but this will not excuse the breach of a positive statutory duty"; and *Baddeley* v. *Granville* (*Earl*) (1) is one of the cases cited in support of the last proposition. In Smith's Law of Master and Servant, 8th ed., p. 173, it is stated that "The defence arising from this maxim" ["Volenti non fit injuria"] "is not applicable to cases where the injury arises from the breach of a statutory duty on the part of the employer," and *Baddeley* v. *Granville* (*Earl*) (1) is again cited as the authority for the proposition.

[Scrutton L.J. No reference to that case is to be found in Salmond's Law of Torts.]

When a workman enters the employment of a master, the master does not say to the servant that he must take the risk of being employed with other servants, but the doctrine of common employment is based upon an implied agreement that the servant will accept the risk of injury through the negligence of a fellow servant. The maxim "Volenti non fit injuria" also rests upon an implied agreement, but where the Legislature has placed an employer under a statutory obligation to do something for the protection of his workmen, the employer cannot say he is not under that statutory obligation because he has made an agreement with the workman to the contrary effect.

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(1) 19 Q. B. D 423.

(2) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.

[SCRUTTON L.J. If the decision in *Baddeley* v. *Granville* (*Earl*) (1) is correct, there was no need for the Legislature to put into statutes a prohibition against contracting out.]

It is not open to an employer to enter into an agreement with his workmen which would debar a workman from the benefit of a statute passed for his protection. The mere absence from a statute of a provision that no agreement to the contrary shall be entered into does not prevent such an agreement being prohibited by statute. With regard to the plaintiff's cross-appeal, there was no evidence upon which the jury could come to the conclusion at which they arrived in answer to Question 5.

Cave K.C. in reply. The contention that the breach of a statutory duty should be followed by liability to damages for breach of that duty cannot be correct. If that had been intended by the Legislature it could have so provided in the statute.

SCRUTTON L.J. I cannot say that this is a very satisfactory case. It arises in this way: A boy of eighteen years of age at the time of the accident was employed as what is called a "shavings boy" in a factory. There is a machine which cuts cardboard, and in doing so makes shavings, and some of the shavings fall about the floor, and some of the shavings stick in the knives in the machine and it is desirable to have them cleared out. The machine can easily be stopped by a lever, and the boy knew within a week of his employment that it could be stopped by a lever, but he says the foreman never told him to stop it. However, he knew it could be stopped by a lever, and he went on for three months taking shavings out of the knives while the machine was working, and by good luck he did so for three months without having his fingers cut off, but at last the evil day came when he lost his hand and fingers. He thereupon sued his employers for damages, saying in effect: "There is a statutory obligation on you to fence this dangerous machine; I have been injured by your not fencing this dangerous machine.

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(1) 19 Q. B. D. 423.

I am a private person who has been injured by your breach of a public obligation; I claim damages," and certain questions were left to the jury. I do not myself understand why the question of contributory negligence was not gone into. I am speaking after the event, and nothing that I say will have any effect on the result, but I should have thought it was one of the clearest cases of contributory negligence I have ever seen. But for some reason it was not argued, and no question was left to the jury about it, and consequently it is much too late to say that if the case had been run on other lines the defendants would probably have won it. First of all, there was a question left to the jury whether the machine was dangerous. Again, I have some trouble in understanding, when inspectors of factories have visited a factory for a long time and never said a machine was dangerous, and never prosecuted, why a jury should be asked to say it was dangerous when the inspector has not thought it dangerous. However, the jury found that the machine was dangerous. Then they were asked: "Did the plaintiff undertake the work knowing the danger and taking the risk?" which is another way of putting the maxim which sometimes appears in Latin, "Volenti non fit injuria," the man is willing to take the risk; and that has been held by the House of Lords in *Smith* v. *Baker* (1) to be a question not of law, as it was thought to be, but a question of fact. Now the question of fact was here left to the jury, and the jury answered "Yes," and Talbot J., who tried this case extremely carefully, and gave a careful and able judgment, said he entirely agreed with the finding of the jury on that point, and I am unable to say that there were no materials upon which the jury reasonably could have come to that finding. So that I approach the case, first of all, with the view that it was very unsatisfactorily tried down below with regard to contributory negligence; and, secondly, with the position that I cannot go into contributory negligence after what has happened down below; and, thirdly, with

(1) [1891] A. C. 325.

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the position that the finding of the jury must stand, and that therefore the cross-appeal must be dismissed with the ordinary consequences in the matter of costs down below, which I do not suppose are very much.

Then I am confronted with this problem. If there is a breach of the statute in that a dangerous machine is not fenced, is it a defence for the employer to say that the plaintiff, the workman, took the risk ? I will use the exact words of the jury : " Did the plaintiff undertake the work knowing the danger and taking the risk ? Answer : Yes." Is that a good defence for the employer ? Now, the immediate authority we have to consider in relation to that is a case which was tried fifty years ago, the case of *Baddeley* v. *Granville* (*Earl*) (1), which was followed eleven years later by the case of *Groves* v. *Wimborne* (*Lord*) (2), where Vaughan Williams L.J. said this (3) : " It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty." Vaughan Williams L.J. goes on at a later stage of the judgment to say that one of the matters that excuse the employer from the charge that he has not performed his statutory duty is that there was contributory negligence on the part of the plaintiff. Mr. Fox-Andrews agrees, and I do not think he could take any other position, that it is a good defence to a defendant charged with a breach of a statutory duty that the accident was caused by the contributory negligence of the plaintiff. There remains the question, though contributory negligence is a satisfactory defence, is a finding that the plaintiff knew and took the risk a defence ? Vaughan Williams L.J. does not mention it, because he says (4) : " I do not care whether the view of Lord Abinger C.B. in *Priestley* v. *Fowler* (5) be

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(1) 19 Q. B. D. 423.
(2) [1898] 2 Q. B. 402.
(3) [1898] 2 Q. B. 415.
(4) Ibid. 417.
(5) (1837) 3 M. & W. 1.

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taken, and the defence be based on the maxim 'Volenti non fit injuria,' or the view expressed in later cases be taken, and the defence based on an implied contract between the master and servant that the latter will take the risk of an injury caused by the negligence of a fellow servant. In either case the defence seems to me to be a defence because it is an answer to a claim for damages by the servant and for no other reason." He is there dealing with the question of common employment rather than with the simple case of volenti without any regard to the negligence of a fellow-servant; and though Vaughan Williams L.J. does say that contributory negligence would be a defence, I do not find that he says that volenti proved by itself would be a defence. When we turn to *Baddeley's* case (1), which Talbot J. said he was bound by, the question is, are we prepared to overrule a case which has stood for fifty years, and has no doubt been the basis of many transactions? The facts in *Baddeley* v. *Granville* (*Earl*) (1) were these: Rules made under the Coal Mines Regulation Act, 1872, required the banksman to be constantly present at the pit's mouth when men were going up and down the shaft. In that particular mine for years that rule had been broken; it was the regular practice that no banksman should be present during the night when the men went up and down the shaft. The man who was killed, the husband of the plaintiff, was aware of the fact that there was no banksman, but he continued going up and down the shaft, and when he was going up the shaft one night a boy of fourteen years of age called out an order to the engineman which, being acted on, resulted in the plaintiff's husband being killed. The question in *Baddeley's* case (1) undoubtedly was: Is it a defence to an action against the employer for an injury arising from the breach of a statutory duty on the part of the employer to say that the man who was killed knew all about it, and in *Baddeley's* case (1) the Divisional Court held that it was not a good defence. I confess I should have been happier if I had understood why they did so, because I cannot make

(1) 19 Q. B. D. 423.

out from Wills J.'s judgment whether he was deciding the case on the ground that it is contrary to public policy that where there is a statutory obligation on the employer the workman should contract out of it, or whether he was deciding the case on some ground which I do not understand. He does not hold as a matter of law that the agreement would be illegal as being against public policy. But though I do not understand the ground upon which the case proceeded, it is a case which has stood for fifty years, and it fits in with the decision in *Groves* v. *Wimborne* (*Lord*) (1), and though I am not satisfied with the way in which this case has been tried, I am satisfied that it is now too late to interfere with the decision in *Baddeley's* case (2), which has stood in the books for fifty years, and that disposes of the case.

I only want to say this about *Rudd* v. *Elder Dempster & Co.* (3). The case has still to come before the House of Lords, and the House of Lords will give the facts in that case more consideration than they probably did in *Lochgelly Iron and Coal Co.* v. *M'Mullan.* (4) They may, as Talbot J. thought, find the case quite different in its facts from the Scotch case and what they were considering on that occasion. Therefore I say nothing whatever about the facts of that case and whatever bearing it may have on this case. It follows, therefore, in the view I have taken that both the appeal and the cross-appeal are dismissed with costs—such costs as are applicable in this case.

GREER L.J. I take the same view. I am satisfied that the learned judge who tried the action with a jury was right in his view that there was ample evidence for the jury, if they chose to act upon it, to answer Question 5 in the way they did—namely, that the plaintiff undertook the work knowing the danger, and taking the risk of that danger. The cause of action in this case is for a breach of a term of the Factory Acts which requires dangerous machinery

(1) [1898] 2 Q. B. 402. (2) 19 Q. B. D. 423. (3) [1933] 1 K. B. 566.
(4) [1933] W. N. 192; 49 Times L. R. 566.

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to be fenced, and the question is whether the defence of volenti non fit injuria is available to the defendants. If it is a good defence to that action, it was made out in the present case and has been found by the jury. There was a time when it was in doubt whether, where a statute created an obligation enforceable by proceedings in the police court for a penalty, the obligation thereby created became a duty on the part of the employer to his servant, so that an action for a breach of that statutory duty would lie at the suit of a workman who was injured against his employer. But it was decided in *Groves* v. *Wimborne* (*Lord*) (1) that on proof of a breach of a statutory duty imposed on an employer by the Factory and Workshop Act, 1878, to fence dangerous machinery, and injury resulting to a workman therefrom, prima facie the workman had a good cause of action. It does not seem to me necessarily to follow from that case that the duty so created by statute could not be met by the same kind of defences that are available for a duty from one individual to another created by the common law, and if the argument which Mr. Cave has put forward in this appeal had been addressed to the Court forty years ago, I should have thought there would have been a good deal to be said for taking a different view of the law from that of the Divisional Court in *Baddeley* v. *Granville* (*Earl*) (2), which was decided in 1887, over forty-six years ago. What has happened, however, since then? There have been innumerable contracts of employment between workpeople and factory owners. There have been innumerable actions for damages in respect of accidents which have happened in factories. There must have been any number of cases in which insurance premiums have been fixed on the basis that the employer is liable to his workpeople for breach of the duty imposed by the Factory Act, and that the defence of volenti non fit injuria is no answer to a claim of a workman made in respect of such a breach of duty. In these circumstances, although it is not as old possibly as some members of the Bench, I do not think a case of this respectable antiquity ought now to be overruled. I think if it is to be overruled, the duty of doing so should be undertaken by the House of Lords, and not by this Court.

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(1) [1898] 2 Q. B. 402.

(2) 19 Q. B. D. 423.

I agree that both appeals should be dismissed with costs respectively.

SLESSER L.J. I agree that this appeal fails. It was decided in 1887 in *Baddeley* v. *Granville* (*Earl*) (1) that the defence arising under the maxim "Volenti non fit injuria" was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer, and if that case is still good law Mr. Cave concedes that he must fail in this appeal. This appeal in effect has become an appeal from the case of *Baddeley* v. *Granville* (*Earl*), and Mr. Cave asks us to say that that authority should not now be accepted, and it certainly is not necessarily binding on us. I agree with what my Lords have said as to the inexpediency of our disturbing a decision which has been acted on for so many years. Speaking for myself, however, apart altogether from that consideration, in my view the principle which is there established has been accepted by this Court in the case of *Groves* v. *Wimborne* (*Lord*) (2) in 1898. I say that for the following reason. Two matters came before the Court in *Groves* v. *Wimborne* (*Lord*). (2) In that case there was a claim for damages for personal injuries following on the breach by the employer of a statutory duty imposed by the Factory and Workshop Act, 1878, and one question was concerned with the right of the person injured to sue in civil proceedings for damages for the injury sustained as the result of that accident caused by the failure to comply with the obligations of the Factory Act by the employer. But the second question arose thus: It was argued that the accident arose in effect through the negligence of a fellow-servant, and the defence of common employment was there urged. The Court of Appeal held that where there was a breach of a statutory duty of this

(1) 19 Q. B. D. 423.

(2) [1898] 2 Q. B. 402.

sort the doctrine of common employment could not successfully be relied upon, and all three of the judges then composing the Court of Appeal expressed their opinion on that point. Now it seems to me on principle that if the doctrine of common employment could not be relied upon by reason of the absolute obligation imposed by the statute, neither can the doctrine of volenti non fit injuria. It must be remembered that the doctrine of common employment in its earlier stages was treated, particularly in the case of *Priestley* v. *Fowler* (1) by Lord Abinger C.B., as a branch of the more general principle of volenti non fit injuria, as the Chief Baron there says (2): "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master." The particular danger which was there dealt with, and which the action was based on, was that the plaintiff had suffered an injury by reason of the negligence of a fellow-servant. Later on, as Vaughan Williams L.J. points out in *Groves* v. *Wimborne* (*Lord*) (3), the defence was based on an implied contract between the master and servant that the latter would take the risk of injury caused by the negligence of a fellow-servant. Therefore the matter stood thus, as I see it. In *Groves* v. *Wimborne* (*Lord*) (4) it was decided that the statutory obligation to comply with the Factory Acts was such that the defence of common employment was not open to the employer. As Rigby L.J. said (5): "Where an absolute duty is imposed upon a person by statute it is not necessary, in order to make him liable for breach of that duty, to shew negligence. Whether there be negligence or not, he is responsible quacunque via for non-performance of the duty," and therefore, whether there be negligence or not, it follows that once the duty be established, and a breach of it, the doctrine of common

(1) 3 M. & W. 1.
(2) Ibid. 6.
(3) [1898] 2 Q. B. 418.
(4) Ibid. 402.
(5) Ibid. 412.

employment cannot be a defence. Now, volenti non fit injuria, which is not common employment, rests as I say upon the same principles. Common employment may at least be argued as a kind of volenti non fit injuria, but any other kind of obligation which the workman takes upon himself cannot be used as a defence if in fact there is a breach of the statutory duty. I therefore find in that case an approval of what is laid down in *Baddeley's* case. (1) I would only add this. Mr. Cave has asked us to say why it is (asking the question rhetorically) that in the case of contributory negligence it has been decided that the defence will lie notwithstanding that there has been a breach of the statute. The difference seems to me to be this, that where contributory negligence is found, that is a finding that the essential cause of the accident is the negligence of the plaintiff himself, and therefore he fails for that reason. That is not the case either in common employment or where the doctrine of volenti non fit injuria is set up. I agree with what has been said by Mr. Fox-Andrews as to the distinction, because in one case there is a further intervening cause, that is the negligence of the plaintiff, which does not arise in the case of volenti non fit injuria or common employment. I would add that I agree with what has been said by my Lords as to the cross-appeal.

Appeal and cross-appeal dismissed.

Solicitors for appellants: *Cole & Matthews.*
Solicitor for respondent: *F. J. Stewart.*

(1) 19 Q. B. D. 423.

R. F. S.

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THE KING *v.* HENDON RURAL DISTRICT COUNCIL.

Ex parte CHORLEY.

Local Authority—Certiorari—Town Planning—Draft Scheme—Interim Development Order—Application for Permission to develop—Consideration by Council—Decision affecting Rights of Subjects—Contingent Right to Compensation—Judicial Decision—Interest of Councillor—Bias—Town Planning Act, 1925 (15 *Geo.* 5, *c.* 16), *ss.* 2, 4, 10.

A certiorari will lie to bring up a decision of a local authority to permit development pending the final approval by the Minister of Health of a town-planning scheme.

Dicta of Atkin L.J. in *Rex* v. *Electricity Commissioners. Ex parte London Electricity Joint Committee Co.* (1920), *Ld.* [1924] 1 K. B. 171, 205 applied.

Resolutions had been passed by a rural district council for the preparation of a town-planning scheme, and the scheme was awaiting the approval of the Minister of Health, who had made, under s. 4 of the Town Planning Act, 1925, an Interim Development Order, under which persons could apply to the council for permission to build, pending the approval of the scheme by the Minister. This permission, if granted, would safeguard the applicants' right to compensation under s. 10 of the Town Planning Act, 1925, in the event of their property being injuriously affected by the making of the town-planning scheme. An application was made to the council for permission to develop certain premises in the area covered by the proposed town planning scheme. Objections were invited and considered by the council, who unanimously decided to permit the proposed development, pending the final approval by the Minister of Health of the town-planning scheme:—

Held, that as the decision of the council to permit the development in question conferred a legal right to compensation in certain events and affected the rights of subjects, it was sufficiently near a judicial decision to be the subject of a writ of certiorari.

Where, therefore, one of the councillors voting in favour of the resolution to grant permission to develop, had such an interest in the matter as to disqualify him from taking part or voting, on account of bias, an order nisi for a writ of certiorari to quash the decision of the council was made absolute.

ORDER NISI for a certiorari.

From affidavits filed in the proceedings it appeared that the applicant, Mr. Robert Samuel Theodore Chorley, barrister-at-law, was the owner and occupier of premises known as The Rookery, Great Stanmore, Middlesex. Those premises fronted on to a road known as Stanmore Hill. Almost immediately opposite The Rookery were premises known as The Old Brewery Stables, Great Stanmore. Both of those premises were situate within the area of a town-planning scheme in course of promotion by the Hendon Rural District Council under the Town Planning Act, 1925. Resolutions for the preparation of a town-planning scheme under earlier Acts were passed in 1915 and 1918. The draft town-planning scheme was awaiting the approval of the Minister of Health. A preliminary statement relating to the whole area was adopted by the Hendon Rural District Council in August, 1923, and confirmed by the Minister of Health in November, 1925. The applicant bought The Rookery in July, 1929, as a residence for himself and his family, being greatly influenced by the fact that both it and The Old Brewery Stables were shown in the preliminary statement as being in a residential zone, in which the only buildings which might be erected without the council's consent were buildings for residential purposes.

On November 6, 1925, the Minister of Health, in pursuance of s. 4 of the Town Planning Act, 1925 (1), made the Hendon

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(1) By the Town Planning Act, 1925 (15 Geo. 5, c. 16), s. 2, local authorities were empowered to prepare town planning schemes.

Sub-s. 2: "A town planning scheme prepared or adopted by a local authority shall not have effect unless it is approved by order of the Minister. . . . ."

Sect. 4: "The Minister may by special or general order provide that where a resolution to prepare or adopt a town planning scheme has been passed . . . . the development of estates and building operations may be permitted to proceed pending the preparation, adoption or making and approval of the town planning scheme, subject to such conditions as may be prescribed by the order."

Sect. 10, sub-s. 1: "Any person whose property is injuriously affected by the making of a town planning scheme shall . . . . be entitled to obtain compensation in respect thereof from the responsible authority."

Sub-s. 2: "A person shall not be entitled to obtain compensation under this section on account of any building erected on, or contract made or other thing done with respect to, land included in a scheme, after the date of the resolution of the local authority to prepare or adopt the scheme. . . . . Provided that . . . . (*b*) this provision shall not apply as respects any building erected, contract made, or other thing done in accordance with a permission granted in pursuance of an order of the Minister allowing the development of estates and building operations to proceed pending the preparation,

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REX *v.* HENDON R. D. C. CHORLEY, *Ex parte.*

Rural Town Planning Scheme (Interim Development) Order, 1925, under which persons might apply to the council for permission to build, and this permission, if granted, would safeguard their right to compensation under s. 10 of the Act of 1925.

In September, 1932, a notice-board belonging to a firm of estate agents, of which firm Councillor F. H. Cross was the sole member, was erected on The Old Brewery Stables advertising the premises (which were unoccupied) as being to let or for sale. Councillor Cross was a member of the Plans and Highways Committee of the Hendon Rural District Council. Early in October, 1932, plans were submitted to the council by a Mr. Whitehead, acting on behalf of Mr. T. Archer, for the conversion of The Old Brewery Stables into a garage, petrol-filling station, restaurant, and tea garden, with bathing pool. Mr. Whitehead applied for permission under the Interim Development Order to develop The Old Brewery Stables in that way. Mr. Archer's interest in the land consisted of a provisional contract of purchase, subject to the consent of the council being first obtained. Negotiations regarding this contract had been conducted between Mr. Whitehead, on behalf of Mr. Archer, and Councillor Cross as agent for the vendor. The applicant, after reading an advertisement in the local newspaper relating to the matter, wrote a letter to the council protesting against the proposed development. Adjoining owners also protested against the proposed development and their objections were submitted to the Plans and Highways Committee. That committee passed a resolution recommending to the council that the plans submitted by Mr. Whitehead on behalf of Mr. Archer be approved and the permission granted. On December 1, 1932, at a meeting of the council the application and plans were considered. Councillor Cross was present, but took no part in the matter. It was proposed and

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adoption or making and approval of the scheme, and the carrying out of works so permitted shall not prejudice any claim of any person to compensation in respect of property injuriously affected by the making of the scheme."

seconded that the plans be approved and a permit granted. No member spoke on the resolution, and it was carried unanimously. At another meeting held in January, 1933, at which Councillor Cross was present, a motion for the rescission of that resolution was defeated.

The applicant obtained this order calling on the Rural District Council of Hendon to show cause why a decision of the council by resolution, dated December 1, 1932, to permit development and building operations on a site known as The Old Brewery Stables, Great Stanmore, in the Hendon Rural District, pending the final approval by the Minister of Health of a town-planning scheme, should not be quashed. The grounds put forward when the order nisi was asked for were: (1.) That Councillor F. H. Cross, who took part and voted (*a*) on the decision of the council to grant the said permission and (*b*) on the motion to rescind that decision, was biased, and/or had such an interest in the matter as to disqualify him from taking part or voting; and (2.) that the applicant for the permission, a Mr. T. Archer, had no interest in the land so as to entitle him to make the application or the council to grant it.

A. M. Trustram Eve showing cause. The writ of certiorari has never issued to a local authority. It will only lie in respect of a judicial decision, and the proceedings of local authorities are administrative and executive and not judicial. The applicant for the writ of certiorari cannot succeed unless he satisfies the Court that the decision of the Hendon Rural District Council which he seeks to have quashed in this case was a judicial decision. It is submitted that the decision in question was an administrative or executive decision. Moreover, the applicant here is not a person aggrieved. It is immaterial whether Councillor Cross voted on the resolution granting the permission to develop or not, because the act of the council in granting the permission was not a judicial but an administrative one: see *Murray* v. *Epsom Local Board.* (1) The council was acting under the power

(1) [1897] 1 Ch. 35.

given to it by the Minister of Health to grant interim permissions to develop, subject to conditions. The evidence is that Councillor Cross abstained from voting on the resolution. In any event the decision of the council has not been vitiated. There is nothing in the Act requiring an applicant for an interim permission to have a proprietary interest. The council had no power to prevent the development of the site. The only effect of the permission to develop was to safeguard Mr. Archer's right to compensation under s. 10 of the Town Planning Act, 1925, in the event of his building having to be pulled down if it should contravene the town-planning scheme when finally approved by the Minister. The council's duty was not to decide an issue between two parties, such as would be involved in a judicial proceeding, but to protect the ratepayers against the possibility of claims for compensation. That was an administrative and not a judicial act. The order nisi for certiorari ought to be discharged: see *In re Forsey and Hollebone's Contract.* (1)

J. Hodson in support. Councillor Cross, as agent for the vendor of The Old Brewery Stables, was biased in the sense that he had such an interest in the matter as to disqualify him from taking part or voting, and he voted for the resolution to permit development and building operations on the site of The Old Brewery Stables by his conduct in acquiescing. If he abstained from voting, then all the other councillors present abstained, and there was no resolution. But it is clear that the resolution was carried unanimously, and every councillor present must be taken to have voted for the resolution even though the votes were not expressly recorded: see *Everett* v. *Griffiths.* (2) The council had recognized the judicial character of its decision by causing the application for permission to develop to be advertised and inviting objections to the proposed development and considering them. Moreover, by passing the resolution permitting the development the council conferred on the person on whose behalf the application for permission to develop was made

(1) [1927] 2 Ch. 379.

(2) [1924] 1 K. B. 941.

a legal right to claim compensation in certain events: see s. 10 of the Town Planning Act, 1925. That was a judicial decision in respect of which certiorari will lie. Atkin L.J. in *Rex* v. *Electricity Commissioners* (1) points out that wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writ of certiorari and the writ of prohibition, but that does not fully explain the meaning of the words "to act judicially." [*Rex* v. *Woodhouse* (2) was also referred to.] The writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it does lie to remove, and adjudicate on the validity of, judicial acts: see *Reg.* v. *Dublin Corporation* (3), where May C.J. said: "In this connection the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others." In *Rex* v. *Local Government Board for Ireland* (4) Palles C.B. in his judgment deals with and approves of the judgment of May C.J. in *Reg.* v. *Dublin Corporation.* (3)

[LORD HEWART C.J. That is all summed up by Atkin L.J. in *Rex* v. *Electricity Commissioners.* (1)]

Yes. In this case the decision of the rural district council conferred on the applicant for permission to develop a contingent legal right to compensation. It is therefore a decision which affects "the rights of others," within the meaning of the words used by May C.J. in *Reg.* v. *Dublin Corporation.* (3) The applicant for the writ of certiorari in this case is interested in the matter, not only as a ratepayer who may be liable in the future to contribute to the compensation, if any, which may become payable, but also as an adjoining owner whose property may be likely to be affected by the proposed development. He is therefore entitled to the writ of certiorari and the rule should be made absolute.

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(1) [1924] 1 K. B. 171, 205.
(2) [1906] 2 K. B. 501.
(3) (1878) 2 L. R. Ir. 371, 376, 377.
(4) [1902] 2 I. R. 349, 373.

LORD HEWART C.J. This case has been very fully and clearly argued by Mr. Trustram Eve, but nevertheless I think that the rule ought to be made absolute. It seems to me to be quite clear that Councillor F. H. Cross was biased, or had such an interest in the matter as to disqualify him from taking part or voting, and that he was undoubtedly present at the passing of the resolution dated December 1, 1932, and I think the true conclusion is that he voted. The question remains whether that proceeding was sufficiently near a judicial proceeding to be the subject of certiorari, and upon that point I will refer only to the following words of Atkin L.J. (as he then was) in *Rex* v. *Electricity Commissioners. Ex parte London Electricity Joint Committee Co.* (1920), *Ld., and Others* (1): "It is to be noted that both writs"—that is to say, the writ of prohibition and the writ of certiorari—"deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

I think it is clear from the evidence that the hearing of this resolution was advertised, objections were invited and considered, and the decision at which the Hendon Rural District Council arrived was a decision which conferred, contingently at any rate, a legal right, and affected the rights of subjects.

Reference has usefully been made to the earlier cases of *Reg.* v. *Dublin Corporation* (2); *Rex* v. *Local Government*

(1) [1924] 1 K. B. 171, 205.

(2) (1878) 2 L. R. Ir. 371, 376, 377.

Board for Ireland (1); and *Rex* v. *Woodhouse.* (2) I do not read the passages which were very properly cited to us by Mr. Hodson. They seem to be very much in point, and are really summed up in the passage which I have read from the judgment of Atkin L.J. in *Rex* v. *Electricity Commissioners.* (3)

I think, therefore, that this rule for a writ of certiorari ought to be made absolute.

AVORY J. I am of the same opinion. I think that the application for the rule succeeds on the first ground on which it was moved, which was, that Councillor F. H. Cross, who took part in, and voted on, the decision of the Council to permit the development and building operations in question and on the motion to rescind that decision, was biased, or had such an interest in the matter as to disqualify him from taking part or voting. I do not think that the application succeeds so far as the second ground is concerned—namely, that the applicant for the permission to develop has no interest in the land so as to entitle him to make the application or the council to grant it. If it were necessary to show that the applicant for the permission in question had an interest in the land I think there was sufficient evidence that he had such an interest.

There is really no dispute that Councillor F. H. Cross was, in fact, biased in the sense that he had such an interest in the matter as to disqualify him from taking part or voting, and there is no question that he did vote, in the sense in which the word is understood. It was suggested by Mr. Trustram Eve that neither he nor any one else present, in fact, voted, but, as was pointed out in one of the authorities, if that is so, then nobody voted, and no resolution was passed. But it is clear that the resolution was passed, and it can only have been passed by the votes of those who were present. The fact that the votes were given silently and not by any oral expression of sound seems to me to make no difference, and as Mr. Cross, in fact, took part and voted,

(1) [1902] 2 I. R. 349, 373.
(2) [1906] 2 K. B. 501, 534.
(3) [1924] 1 K. B. 171, 205.

the only remaining question, as my Lord has said, is whether that proceeding—the passing of the resolution of December, 1932—was of such a nature as to be the subject of a writ of certiorari.

I think we ought to apply the principle which was laid down by Brett L.J. (as he then was) in *Reg.* v. *Local Government Board* (1), where he said that the jurisdiction of the Court ought to be exercised widely when dealing with matters which are not perhaps strictly judicial, but in which the rights and obligations of persons may be affected; and the quotation from the judgment in *Rex* v. *Electricity Commissioners* (2) is, I think, sufficient to show that in this case a right of a subject was involved. In other words, I accept Mr. Hodson's argument that the effect of the resolution of December 1, 1932, was to confer upon Mr. Archer a right, in certain events, to compensation, and as the council was, therefore, dealing with a matter which affected the rights of an individual, I think the case comes within the principles laid down in *Rex* v. *Electricity Commissioners.* (2)

For those reasons I think the rule ought to be made absolute on the first ground.

HUMPHREYS J. I am of the same opinion. Upon the question whether Mr. Cross must be taken to have voted on the decision of the council to grant the permission asked for, the case of *Everett* v. *Griffiths* (3), although it is not binding on this Court, is a clear and accurate indication of the course which ought to be taken where it is found that in truth there was no calling by the chairman for votes on either side, but merely, as in this case, that the persons who had the right to vote indicated by either words or conduct that they approved of the proposal that was made. I agree entirely with the judgment of McCardie J. in that case.

I also agree that the rule ought not to be made absolute on the second ground, and I desire to add nothing to what has been said by Avory J. on that matter.

(1) (1882) 10 Q. B. D. 309, 321.
(2) [1924] 1 K. B. 171, 205.
(3) [1924] 1 K. B. 941.

With regard to the difficult question whether the proceedings of this council on the occasion in question were proceedings in respect of which certiorari will lie, many observations are to be found in different cases by many learned judges who have endeavoured to express the particular circumstances in which a body, admittedly exercising, not the jurisdiction of a Court, but a discretion of some sort or other, should be regarded as proceedings which can be dealt with by this Court by a writ of certiorari. The passage which my Lord has read from the judgment of Atkin L.J. in *Rex* v. *Electricity Commissioners* (1) leaves unexplained to some extent the meaning of the words "to act judicially." Atkin L.J. said (1): "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling influence of the King's Bench Division." I think some assistance is to be obtained with regard to the meaning of the words "to act judicially" from the judgment of Fletcher Moulton L.J. in *Rex* v. *Woodhouse* (2), where the learned Lord Justice said: "There must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law."

I think it is not uninteresting to see the view which the Hendon Rural District Council took of the application which was made to it under the town-planning scheme. The council evidently thought that to do justice in this particular case the application ought to be advertised in the local paper, so that if persons had any objections to the scheme they might come forward and be heard. The result was that the council required that the applicant should advertise at his own expense, and should state in such advertisement that any objections addressed to the council in writing would be considered by it, and, accordingly, objections were received to the granting of this order, among others, an objection from the applicant for the writ of certiorari in this case. The application and the objections were all considered

(1) [1924] 1 K. B. 171, 205.

(2) [1906] 2 K. B. 501, 535.

together by the Highways and Plans Committee, and then finally the matter came before the council.

It is quite true that the Act of Parliament under which the council was considering this application does not require that there should be any advertisement or notice of the application or an opportunity for objections being made, or that if made they should be considered, but it seems to me to be impossible to say in this case that the Hendon Rural District Council was not acting in a quasi-judicial manner in hearing and determining the application for permission to develop and the objections which were made to it.

I therefore agree that in this case it has been sufficiently shown that the discretion which was exercised by the members of the council was a judicial discretion. The issue of a writ of certiorari is therefore justified. Further, it appears to me to be beyond question that Mr. Cross, one of the persons who, as I am satisfied, did vote upon that matter, was a person with regard to whom it is right to say that he was biased.

For these reasons I agree that the rule should be made absolute.

Rule absolute.

Solicitors showing cause: *Chas. Rogers, Sons & Abbott.*
Solicitors in support: *Joynson-Hicks & Co.*

T. W. M.

THE KING *v.* SUSSEX JUSTICES.

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May 31.

Ex parte BUBB.

Licensing—Hours of Opening—Exemption—Special Occasion—Summer Time—Premises in Coastal Area—Order of Justices—Excess of Jurisdiction—Certiorari—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *ss.* 57, 102.

The statutory period of summer time is not a "special occasion" within the meaning of the Licensing (Consolidation) Act, 1910, s. 57, sub-s. 1.

The justices, who were the local authority for a division including a coastal area, on an application under the Licensing (Consolidation) Act, 1910, s. 57, sub-s. 1, made an order purporting to be a special order of exemption thereunder exempting the holder of a justices' on-licence in that area from the general provisions relating to permitted hours, for the hours between 10 P.M. and 10.30 P.M. on every day except Good Friday and Sundays, during the statutory period of summer time in the year 1933 as being a "special occasion" within the meaning of the sub-section. The application had been made on behalf of a number of specified licensees in the division, and the justices had decided to grant the special order to those licensees whose premises were in the coastal area and who might apply therefor, the above order being one of the intended orders which had been applied for and drawn up. The divisional police having obtained an order nisi for a certiorari to remove the order of the justices into the High Court:—

Held, that the order of the justices was not such a special order of exemption as they had jurisdiction to make under the sub-section, inasmuch as the period of summer time for which it was granted was not a "special occasion" within the meaning of the sub-section, and the extent of the area and the number of the licensed premises to which it was applicable showed that it was general in its scope; that, as the justices in making the order had exceeded their jurisdiction, certiorari would lie in the absence of any provision to the contrary, and that there was no such provision in s. 102 of the Act or elsewhere; and consequently that the order nisi should be made absolute.

Rex v. *Butt and Another. Ex parte Brooke* (1922) 38 Times L. R. 537 held applicable.

ORDER NISI for a certiorari.

On April 11, 1933, certain justices for the county of Sussex, acting for the petty sessional division of Steyning, in the administrative county of West Sussex, at a petty sessions held at Shoreham-by-Sea, in pursuance of the Licensing Acts, 1910 and 1921, granted to Mr. C. O. Pigott, who was licensed to sell certain intoxicating liquors, and kept a house known as "The Swiss Cottage" at Shoreham-by-Sea, a special order of exemption, exempting the applicant from the provisions of these Acts relating to permitted hours, during the hours between 10 and 10.30 o'clock in the afternoon of April 13, 1933, and also during the same hours on every day thereafter, excepting Good Friday and Sundays, until October 9, 1933, in order that he might be enabled to sell and supply such intoxicating liquors as he was by law licensed to sell and supply on the occasion of the summer holiday season.

On May 23, 1933, Mr. T. W. Bubb, of Shoreham-by-Sea, superintendent of police for the said division (hereinafter called "the applicant"), obtained an order nisi calling upon the justices to show cause why a writ of certiorari should not issue to remove their order into this Court on the grounds: (*a*) That the justices in making the order exceeded their jurisdiction under the Act of 1910, s. 57 (1); (*b*) that there was no definition of the expression "coastal area" within which it was said that the justices had announced that they would grant the exception.

In support of the application an affidavit was made by the applicant, in which he stated that on April 11, 1933, before the justices, Mr. E. D. Gates, solicitor, on behalf of the Brighton and County Licensed Victuallers' Protection Society and the Shoreham and District Licensed Victuallers' Association, made an application to the justices under s. 57

(1) The Licensing (Consolidation) Act, 1910, provides:—

Sect. 57: "(1.) If the holder of a justices' on-licence applies to the local authority for an order (in this Act called a special order of exemption) exempting him from the provisions of this Act relating to general closing hours on any special occasion or occasions, the local authority may, if in their discretion they think fit to do so, grant to the applicant such a special order so exempting him during the hours and on the special occasion or occasions specified in the order."

Sect. 102: "No conviction or order made in pursuance of this Act, originally or on appeal, relative to any offence, penalty, fine, forfeiture or summary order, shall be quashed for want of form; or, if made by a court of summary jurisdiction, be removed by certiorari or otherwise, either at the instance of the Crown or of any private party, into any superior court."

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for a special order of exemption, such as is above mentioned, to be granted to all the holders of justices' on-licences within the said division who were members of that society and association; that the permitted hours in force in the division on the date when the application was made were on weekdays from 10.30 A.M. to 2.30 P.M. and from 6 P.M. to 10 P.M.; that the application was made on behalf of the said several holders of justices' on-licences collectively and not individually, and that in no instance was the case of any one of these licence holders considered separately by the justices upon its merits; that Mr. J. E. Dell addressed the justices on behalf of the police; that the chairman announced that the justices had decided to grant a special order of exemption to those licence holders whose premises were situated in the coastal area of the division, and who might apply to the clerk to the justices therefor, the orders being made out in blank for that purpose, and that the term "coastal area" was not defined by the justices, nor was any enumeration made of the licence holders whose premises came within that area; that the said special order of exemption was in certain specified terms, these terms being similar to those of the order granted to Mr. Pigott; that the said order had been applied for and obtained by certain named licensees; that the order had been drawn up as a separate order in respect of each of these on-licensed premises in the division, although in fact it was a general order to the extent mentioned; and that by reason of the order uniformity in permitted hours in the division had been destroyed.

In opposition to the application an affidavit was made by Mr. A. D. M. Edwards, solicitor, clerk to the justices of the division, in which he stated that he was present at the sitting of the justices on April 11, 1933; that the statement in the affidavit of the applicant that Mr. Gates applied for a special order of exception to be granted to all the holders of justices' on-licences within the division who were members of the said society and association was not correct; that Mr. Gates applied for a special order of exemption on behalf of a number of licensees whose names and premises were specified in a certain list and in certain letters; that he intimated that he would not press the application so far as it applied to licensed houses not in the coastal towns of Shoreham, Lancing, Kingston and Southwick; that the justices in granting the special order of exemption considered each and every licensee specified in the list and letters; that it was manifestly impracticable for the justices to consider each licensee one after the other, and that Mr. Dell did not object to the application being made collectively in point of time, nor did he direct the attention of the justices to any particular circumstances affecting any one or more of the licensees as distinguished from the others; that in addition to the contentions of Mr. Gates referred to in the affidavit of the applicant, Mr. Gates also contended that summer time, as now defined by s. 1, sub-s. 2, of the Summer Time Act, 1925, constituted a special occasion during the period of summer time and that the statutory period of summer time was not in force when the Act of 1910 was passed; that during the summer holiday season there was a large influx of visitors to the coastal parishes and that the exemption would be of special benefit to these visitors, and that this was a matter of which the justices had judicial knowledge; that the statements in the affidavit of the applicant about the decision of the justices was incorrect; that the justices ordered that a special order of exemption should be granted to each of the licensees specified in the application whose premises were in the four coastal towns, and that the orders were not made for a "coastal area" but for those of the applicants whose premises lay in these four coastal parishes; that the justices intimated that if any licensees whose names did not appear in the list wished to apply subsequently for a similar order it would be granted if properly applied for; that the orders were not made out in blank, but the licensees were informed that they could call for them at the clerk's office, and that orders in respect of all the applications granted were subsequently signed by two of the justices; that accordingly special exemption licences were granted to certain specified licensees both on April 11, 1933, and subsequently; that no general order was made, but a separate order was made in respect of each licensee; and (para. 14 of the affidavit) that the justices came to the conclusion that for the districts mentioned the whole period of summer time from April 13 to October 9, as defined by s. 1, sub-s. 2, of the Summer Time Act, 1925, was a special occasion within s. 57, and therefore granted the orders in the exercise of their discretion; and that after the claim for a special order had been granted Mr. Dell applied to the justices to state a case on the point and they agreed to do so, that subsequently a notice was served on him (deponent) requiring the justices to state a case, that no further application had yet been made in respect of that case and no draft case had been prepared, and that the justices were prepared to state a case if required.

An affidavit was also made by Mr. H. W. Warner, who was chairman of the justices by whom the order was made, in which he stated that the justices, after hearing the arguments on both sides, carefully considered the question and came to the conclusion that for specified licensed premises situated in the said four coastal towns of the division the period of summer time was a special occasion; that the circumstances were exactly the same for each of the licensed premises in these coastal towns and therefore it was unnecessary and would have been impracticable to consider each of these premises separately in point of time; that the justices, however, had the list of the licensed premises before them and only granted the order to those licensees who had applied for it; and that they did not grant the order to licensed premises in the "coastal area" of the division or use any such general terms.

Birkett K.C. and *Eric Neve* showed cause. The order of the justices was a valid special order of exemption under the Licensing (Consolidation) Act, 1910, s. 57. It was a special order as being limited in respect of time. The statutory period of summer time during which the order exempted the licensee from the ordinary closing hours for an additional half-hour each day was a "special occasion" within the meaning of that section. It provided for an occasion during which people might remain each day longer in the open air and on the beach, and therefore longer in need of refreshment out of doors. There is no reason why the section, which may undoubtedly apply to an occasion lasting for a week or a month, should not extend to the period of summer time. The order was also a special order as being limited in respect of area, for the evidence shows that it applied only to the four coastal towns of the petty sessional division. The order was, further, a special order as being limited in respect of the licensees to whom it was granted, since it appears that it was confined to the applicant or, at all events, to those licensees whose names were included in a list supplied to the justices, and was not even granted to all of these. The section empowers the local authority to make the special order, "if in their discretion they think fit to do so," and in the present case the justices, with a thorough knowledge of the requirements of the locality and all the other circumstances of the case, having in the exercise of their discretion come to the conclusion of fact that the period of summer time was in all these circumstances a special occasion within the Act, the Court ought not to interfere with their order: *Devine* v. *Keeling.* (1) The present case is distinguishable from *Rex* v. *Butt. Ex parte Brooke* (2), in which a certiorari was granted to bring up an order of the justices of Gloucester, because here the order was not a general but a special order, being restricted to certain particular licensees whose circumstances were substantially identical and whose applications were separately considered by the justices.

Even if the order of the justices was one which they ought not to have made, certiorari is not the proper remedy. The process of certiorari can only be resorted to where the lower Court has acted in excess of its jurisdiction. If the justices erred in making their order, they did not do so by exceeding the practically unlimited jurisdiction conferred upon them by s. 57, but only by having unreasonably exercised their discretion in the particular circumstances of the case. Further, the applicant, having applied to the justices for a special case, is not now entitled to a certiorari: *Rex* v. *Thomas* (1) and *Rex* v. *Williams and Others.* (2) Moreover, by s. 102 of the Act of 1910, no order made in pursuance of the Act, if made by a court of summary jurisdiction, can be removed by certiorari. If it was desired to impugn the decision of the justices, the proper course was either to appeal to quarter sessions or to appeal to the High Court by case stated.

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(1) (1886) 50 J. P. 551.

(2) 38 Times L. R. 537.

Flowers K.C. and *Geoffrey Lawrence* in support of the order nisi. The order of the justices was not a special order of exemption within the meaning of s. 57 of the Act of 1910. It was not a special order as regards the time for which it was made. The period of summer time was not such a "special occasion" as is contemplated by the section. That expression is properly applicable only to an occasion of limited duration such as a Bank Holiday, a market, or a fair, and not to a period of the duration of summer time. The section no doubt gives the justices a discretion to consider whether a given occasion is a special occasion, but it does not give them a discretion to treat as a special occasion an occasion which no reasonable person would regard as such. The order was not a special order as being limited to particular licensees. When made by the justices it was left in blank without the name of any licensee or licensed premises. It was equally available for any licensee in the coastal area who chose to go to the office of the clerk, obtain a copy of the blank order, fill it up with the appropriate particulars, and get it signed by two justices. By following that course the applicant obtained his order, and every other licensee in the area either obtained or might have obtained a similar order. The claims of all the licensees in the area were not the same, but varied according to the respective distances of their premises from the shore and in other respects. That the order of the justices was not, in these circumstances, a special order of exemption within the meaning of the section clearly appears from the case of *Rex* v. *Butt. Ex parte Brooke.* (1) If the licensees desired exemption from the general closing hours for an additional half-hour each night for a period so prolonged as summer time, they should have made their application not under s. 57, which only gives the justices power to make a special order of exemption, but under s. 1 of the Licensing Act, 1921, which gives the justices power to make an order of exemption not qualified as special. Before an application can be made under the latter section, however, there must be a previous public advertisement of it under the Licensing Rules.

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(1) (1901) 18 Times L. R. 71.

(2) (1866) 15 L. T. 290.

If, as is submitted, the justices in making the order exceeded their jurisdiction, the proper remedy of a person aggrieved is a certiorari to bring up and quash the order. The fact that those who objected to the order of the justices made an application for a special case is no reason why they should not apply to this Court for a certiorari to quash the order. Unless they had applied for a case within the time limited, they would have entirely lost their recourse to that remedy. Sect. 102 of the Act of 1910 does not take away the right to a certiorari to quash an order which has been made in the total absence of jurisdiction: *Ex parte Bradlaugh* (2); and, moreover, it only applies to an order which has been made in a penal matter.

LORD HEWART C.J. Mr. Norman Birkett, in showing cause, has argued this case with his usual clearness and force, but I have no doubt that this rule should be made absolute. The case involves the construction of s. 57, sub-s. 1, of the Licensing (Consolidation) Act, 1910 (3), which provides as follows: [His Lordship read the sub-section and continued:] The question is whether the order of the justices was a special order of exemption which exempted the applicant from the general provisions of the Act on a special occasion within the meaning of the sub-section. In order to see what happened here it is not necessary to go further than the affidavit of the clerk to the justices. After

(1) 38 Times L. R. 537.

(2) (1878) 3 Q. B. D. 509.

(3) See note (1) ante, p. 708.

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describing how the application was made, he goes on to say that the contention was put forward on behalf of the licensees that summer time as defined by s. 1, sub-s. 2, of the Summer Time Act, 1925, created a special occasion during the period of summer time; that the justices ordered that a special exemption order should be granted to each of the licensees specified in the application whose premises were in the four coastal towns; and that the justices intimated that, if any licensees whose names did not appear in the list of applicants before them wished to apply subsequently for a similar order, it would be granted if properly applied for. In para. 14 of his affidavit the clerk expressly states that the justices came to the conclusion that for the districts mentioned the whole period of summer time, from April 13 to October 9, as defined by statute, was a special occasion within s. 57 of the Act of 1910, and therefore granted the orders in the exercise of their discretion. It seems to me that the period of summer time cannot reasonably be held to be a "special occasion" within the meaning of s. 57; and, indeed, it has been frankly admitted on behalf of the licensees that if the justices could properly have held that period to be a special occasion within the sub-section, then by parity of reasoning they might have further extended the additional time during which the licensed houses might be open each day for the whole period of the licensing year. Moreover, just as I think that this order cannot be a special exemption order, because the occasion for which it was made was not a special occasion within the sub-section, so also do I think that it cannot be a special order on the further ground that it bears the hall-marks of a general order in having been made with reference to the whole of what has been called the coastal area of the division. To my mind the case of *Rex* v. *Butt. Ex parte Brooke* (1), to which our attention has been called, is directly in point.

It is said that certiorari will not lie to bring up and quash the order, because there was no excess of jurisdiction by the justices in making the order. In my opinion there clearly was excess of jurisdiction. It is true that the justices purported to act under s. 57 of the Act of 1910, but they were doing something which the section did not authorize them to do. It is said, further, that s. 102 of the Act of 1910 prevents the order of the justices from being questioned by certiorari, but I fail to see that that section has any bearing upon this matter. It is said, finally, that the applicants for this rule are out of Court, because there was a time when they were minded to raise the whole matter upon a case stated. I think, having regard to the decided cases, that that objection also is immaterial.

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(1) 38 Times L. R. 537.

In my opinion the justices, in making the order in question, clearly acted in excess of their jurisdiction, and the rule for a certiorari ought to be made absolute.

AVORY J. I am of the same opinion on the short ground that the period from April 13 to October 9 in any year, which is here described as summer time, is not a " special occasion " within the meaning of s. 57 of the Act of 1910. I think that there is great force in the argument which has been addressed to us in support of this rule by Mr. Flowers—namely, that if any such order as this could be made at all, the proper procedure for obtaining it would have been under s. 1 of the Licensing Act, 1921, and if an application for such an order had been made, it appears by the Licensing Rules that there would have had to be a previous public advertisement giving an opportunity for any member of the public to come in and oppose the application. In all the other reasons for making the rule absolute which my Lord has stated I entirely concur.

CHARLES J. I agree.

Order absolute.

Solicitors: *Gates, McCully & Buckwell, Brighton; Walmsley & Stansbury, for J. E. Dell & Loader, Shoreham, Sussex.*

J. R.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1933.

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